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91-1748

No.

Supreme Court, U.S.
FILED
MAY 5 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MALCOLM PIRNIE, INC.,
Petitioner,

v.

LYNN MARTIN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether an employer who in good faith attempts to pay its employees who are otherwise exempt from the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*, on a salary basis may use the window of correction found in 29 C.F.R. § 514.118(a)(6) to ameliorate an error in its pay practices by reimbursing employees for any underpayment arising from deductions for absences of less than a day and clarifying or correcting its pay practices so as to avoid having all of the otherwise exempt employees deemed nonexempt and thereby entitled to overtime pay.

PARTIES BELOW AND PARENT COMPANIES

The names of the parties below are identified in the Petition. Malcolm Pirnie, Inc. is a closely-held corporation with no subsidiaries or affiliates and no public stock has been issued.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Malcolm Pirnie, Inc. ("Malcolm Pirnie") respectfully requests that this Court grant the Petition for a Writ of Certiorari seeking review of the decision and judgment of the United States Court of Appeals for the Second Circuit. As discussed below, a review of the issues presented in this case is necessary to resolve a conflict among the circuits on the issue of whether an employer who, in good faith, attempts to pay its employees who are otherwise exempt from the Fair Labor Standards Act ("FLSA" or "the Act") 29 U.S.C. § 201 *et seq.* on a

salary basis may use the window of correction to ameliorate an error in its pay practices.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit is published at 949 F.2d 611 and is set forth in the Appendix to the Petition ("Pet. App.") A at 1a. The opinion of the United States District Court for the Southern District of New York is published at 758 F. Supp. 899 and is set forth in Pet. App. B at 12a.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on November 20, 1991. Pet. App. A. A petition for rehearing was denied by order of that court dated February 7, 1992. Pet. App. C at 31a. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTE(S) AND REGULATION(S) INVOLVED

The statutory and regulatory provisions involved in this case are:

29 U.S.C. § 213 [1]

29 C.F.R. § 541.118.[2]

STATEMENT OF THE CASE

Petitioner seeks review of a decision and judgment of the United States Court of Appeals for the Second Circuit that reversed a district court decision granting summary judgment for Malcolm Pirnie and dismissing with prejudice DOL's complaint for back overtime pay for most of Petitioner's exempt employees. The basis for

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[1] The text of this provision is set forth in Pet. App. D at 32a.

[2] The text of this provision is set forth in Pet. App. E at 46a.

federal jurisdiction in the district court is 29 U.S.C. § 217.

A. Factual Background

Petitioner Malcolm Pirnie is a consulting engineering firm with more than 900 employees nationwide. The majority of the firm's work involves government contracts. The employees in question are considered by Malcolm Pirnie to be exempt from the FLSA and are in grade levels 6 through 9 of Malcolm Pirnie's eleven salary grades. Some 376 employees were in grades 6 through 9 positions during the period in question. The jobs represented include positions such as engineers, architects, scientists, supervisors, accountants, and administrators.[3] The employees are well-compensated, earning salaries from over $30,000 to $70,000 per year. Employees are paid a fixed amount on a bi-weekly basis. In addition, Malcolm Pirnie compensated employees in grades 6 through 8 on a time-and-a-quarter basis for all hours worked in excess of 40 hours in a workweek, irrespective of their exempt status. Likewise, it paid grade 9 employees additional straight time for all hours worked in excess of 40 in a workweek. Malcolm Pirnie is required to account for its employees' time charged, directly or indirectly, to federal, state and local government clients. Accordingly, all Malcolm Pirnie employees are required to account for all of their time and for at least eight hours per workday.

Until December 8, 1988, Malcolm Pirnie's employment handbook stated that an employee who missed a fraction of a workday would have such absences treated as leave without pay, if the time was not made up or charged to a paid leave account. The handbook did not state whether or not that provision was applicable to exempt employees. In fact, Petitioner has maintained that the provision was

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[3] DOL did not contest that these employees meet the duties portion of the FLSA exemption test.

not intended to apply to them. Petitioner never directed an exempt employee to record an absence of less than a day as leave without pay. However, 24 exempt employees in grades 6 through 9 entered "absence without pay" on their time sheets for absences of less than a day. Their paychecks were then issued in accordance with their entries.

Malcolm Pirnie, utilizing the window of correction in the salary basis test, 29 C.F.R. § 541.118(a)(6) (1991), determined that 24 exempt employees in grades 6 through 9 had had deductions in their salaries for fractions of days missed totalling $3,269.78. It reimbursed these employees, and former employees, for all salary deductions that had been made. Petitioner also, on December 8, 1988, clarified its policy regarding absences for less than a day to expressly state that exempt employees would not incur a reduction in salary if they worked less than eight hours in a day. Petitioner also made clear that exempt employees could charge part-day absences to an "overhead" account rather than to their personal leave accounts.

B. Procedural Background

On May 19, 1989, the Secretary of the U.S. Department of Labor ("the Secretary" or "DOL") commenced a lawsuit against Malcolm Pirnie alleging that employees in Malcolm Pirnie's pay grades 6 through 9, during the period of May 1, 1987 through December 8, 1988, were not exempt from the overtime provisions of the FLSA and were therefore entitled to additional overtime pay. On June 12, 1989, Malcolm Pirnie filed an Answer denying that it had violated the overtime provisions of the FLSA and asserting that the employees in question were exempt executive, administrative or professional employees pursuant to 29 U.S.C. § 213 and the applicable regulations found at 29 C.F.R. § 541.

On June 27, 1990, after the close of discovery, Malcolm Pirnie filed a Motion for Partial Summary Judgment asserting that summary judgment was proper on

the issue of whether the employees in grades 6 through 9 had been compensated on a salary basis. The Secretary filed a Cross Motion for Partial Summary Judgment on September 28, 1990. The one issue excluded from the motions was whether 43 particular employees met the duties test for exemption under the Act. On or about October 18, 1990, Malcolm Pirnie was informed that the Secretary would withdraw its complaint insofar as it challenged the exemptions of the 43 particular employees on the grounds that they did not meet the duties test, thereby leaving only the question of whether employees in grades 6 through 9 for the period of May 1, 1987 through December 8, 1988 were compensated on a salary basis.

On March 4, 1991, the District Court for the Southern District of New York granted Malcolm Pirnie's summary judgment motion on the condition that Malcolm Pirnie promptly submit a revised affirmation of its promise to comply with 29 C.F.R. § 541.118(a), which condition was met. On April 1, 1991, Judge Goettel entered a final judgment dismissing the action with prejudice. The district court found that Malcolm Pirnie had properly utilized the window of correction to correct any improper salary deductions and that DOL's view that the window of correction is only available if the employer's pay practices already met every proviso of the salary basis regulation (§ 541.118(a)(1) to (5)) is "too rigid." *Dole v. Malcolm Pirnie, Inc.*, 758 F. Supp. 899, 904 (S.D.N.Y.), *rev'd sub nom., Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611 (2d Cir. 1991).

On November 20, 1991, a panel of the United States Court of Appeals for the Second Circuit reversed and remanded the judgment of the district court, finding that Malcolm Pirnie had a policy of docking pay of its exempt (grades 6 through 9) employees and, for that reason, could not invoke the window of correction.

The Second Circuit relied upon the language in Malcolm Pirnie's Policy Guide, and in its Handbook of Information for Staff, and an affidvait of a DOL investigator (who was never examined as a witness) in finding that:

> [Malcolm Pirnie] maintained a policy of docking pay to grade 6 through 9 employees for fractions of the workday they missed. Thus, [Malcolm Pirnie] was not entitled to invoke the "window of correction" with regard to these employees and, as a result, they may not be considered to have been paid on a salary basis.

Martin v. Malcolm Pirnie, Inc., 949 F.2d 611, 617 (2d Cir. 1991).

The Second Circuit opinion did not mention Judge Goettel's statement in the district court opinion that:

> The record suggests that, corporate literature notwithstanding, the intended and actual policy of [Malcolm Pirnie] with respect to the employees in grades 6 through 9 was to not dock them for absences of less than a day.

Dole v. Malcolm Pirnie, Inc., 758 F. Supp. at 908. The Second Circuit relied upon the fact that the Malcolm Pirnie handbook and guide did not expressly mention that the statement applied only to nonexempt employees. *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d at 616.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Petitioner Malcolm Pirnie respectfully requests that the Court grant its petition for a writ of certiorari to resolve a conflict among the circuits regarding an employer's right to use the window of correction portion of the regulation covering the salary basis aspect of the requirements for exemption from the FLSA. The Court should grant the petition herein to ensure consistency in the application of the FLSA, which affects virtually all employers in the United States. If the Second Circuit decision is permitted to stand, the result would be that employers will be liable for a potentially enormous windfall payment of overtime pay to *all* of their otherwise exempt employees. The amount at risk for American industry, if the Second Circuit decision is permitted to stand, is estimated to be in the tens of billions of dollars.[4] And, as more fully discussed below, employers would be unable to correct even de minimis deductions without incurring catastrophic liability. This, in turn, would result in a severe disincentive for employers to reimburse their exempt employees for any inappropriate deductions. Such a disincentive would be contrary to the purposes of the FLSA and DOL's regulations and policies.

The Second Circuit's interpretation of the salary basis regulation is also contrary to the plain meaning of the regulation. The Court should grant this Petition for Certiorari in order to determine how the lower courts should properly construe the regulation.

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[4] In this connection, we note that Governor Pete Wilson stated that the backpay owing to California *public* employees alone resulting from the similar interpretation of the salary basis test in *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 785 (1991), was three billion dollars. *See* Pet. App. G. at 59a.

I. THE COURT SHOULD GRANT THE WRIT OF CERTIORARI TO RESOLVE A CONFLICT AMONG THE CIRCUITS REGARDING THE CORRECT USE OF THE WINDOW OF CORRECTION FOUND IN THE SALARY BASIS TEST REGULATION

A. The Second Circuit, Contrary To The Fourth Circuit, Imposes A Requirement That All The Elements Of The Salary Basis Test Must Be Met Strictly Before The Window Of Correction Can Be Utilized

Petitioner's Writ of Certiorari should be granted to enable the Court to resolve a conflict among the circuits on the issue of when an employer can properly utilize the window of correction section of the salary basis regulation.

In order to be exempt from the overtime pay provisions of the FLSA, the employee must meet both a duties test and be paid on a salary basis. 29 C.F.R. § 541.118. The salary basis regulation states in pertinent part:

> An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work.

29 C.F.R. § 541.118(a).

The salary basis regulation permits the retention of an employee's exempt status even though certain deductions have occurred. The effect of an impermissible deduction upon that exempt status is to be determined based

upon the facts in each particular case. 29 C.F.R. § 541.118(a)(6). The regulation, commonly known as the "window of correction," further states:

> [W]here a deduction not permitted by these interpretations is inadvertent, *or* is made for reasons other than lack of work, *the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.*

Id. (emphasis added).

Malcolm Pirnie, upon discovering that its policies may not have been consistent on their face with the salary basis regulation (1) revised and clarified its policy; (2) investigated whether any exempt employees had had their pay reduced; (3) restored to all exempt employees any pay which had been deducted for partial day absences; and (4) promised to comply with the salary basis test in the future.[5] Malcolm Pirnie followed the window of correction to the letter. The district court found that the window of correction expressly allowed for remediation and that Malcolm Pirnie had properly utilized the window of correction. *Dole v. Malcolm Pirnie, Inc.*, 758 F. Supp. at 904-08. The district court in so finding stated that Malcolm Pirnie could use the " 'window of correction' . . . to retroactively restore exempt status to [grade 6 through 9] employees who . . . had their pay subjected to reduction for absences of less than a day." *Id.* at 904.

The Second Circuit found, however, that "because [Malcolm Pirnie] subjected grade 6 through 9 employees to pay deductions on the basis of part-day absences, . . . [the] employees may not be considered salaried." *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d at 615, and that Malcolm

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[5] In total, 24 employees had been subject to cash deductions representing approximately 100 hours of work totalling less than $3,300. Over one million hours were worked by the exempt employees in the relevant time period.

Pirnie, therefore, had not proven that the window of correction was available to it. *Id.* at 616-17.[6]

The Second Circuit's view that the salary basis test must be met before an employer can utilize the window of correction is contrary to the view of the Fourth Circuit.[7] In *Hartman v. Arlington County, Va.*, 903 F.2d 290 (4th Cir. 1990), the Fourth Circuit affirmed on the reasoning of the lower court, the grant of summary judgment for the county finding that fire shift commanders are exempt employees. *Id.* at 291-92.

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[6] The Second Circuit also stated that most courts that have addressed the issue of whether employees are paid on a salary basis:

> have agreed that if an employer has a policy of reducing an employee's compensation for fractions of days that the employee is absent from work, then the employer may not invoke the "bona fide executive" exemption with regard to that employee.

Martin v. Malcolm Pirnie, Inc., 949 F.2d at 615. In none of the cases cited by the court did the employer attempt to properly utilize the window of correction. It is worth noting that there is also a split among the circuits as to whether being merely subject to "theoretical" deductions, as opposed to actual deductions, is sufficient to violate the salary basis test. *See Abshire v. County of Kern*, 908 F.2d at 487-89 (if pay is subject to reduction, salary basis test is violated even if no actual deductions are made). *But see Atlanta Professional Firefighters Union, Local 134 v. City of Atlanta*, 920 F.2d 800, 805 (11th Cir. 1991) (pay is not "subject to reduction" because there is no evidence that any captain had actually suffered a reduction in pay).

[7] The Ninth Circuit in dictum also appears to agree with the Second Circuit. In *Abshire v. County of Kern*, 908 F.2d at 489, the court said, in dictum, that subsection 6 (the window of correction) is only available for an employer that makes a *one-time* improper deduction and corrects the error. *See also Knecht v. City of Redwood City*, 683 F. Supp. 1307 (N.D. Cal. 1987); *Dole v. Walker and Armstrong*, 763 F. Supp. 1052, 1054 (D. Ariz. 1990). In *Abshire* and the district court cases, however, the employer did not take the corrective action which is a prerequisite for the use of the window of correction; accordingly, all three cases (*Abshire, Knecht*, and *Walker and Armstrong*) are distinguishable from Malcolm Pirnie's facts.

The district court opinion more fully discussed the availability of the window of correction to the county. *Hartman v. Arlington County, Va.*, 720 F. Supp. 1227, 1229-30 (E.D. Va. 1989), *aff'd*, 903 F.2d 290 (4th Cir. 1990). The plaintiffs in that case had argued that they were not salaried because the county had "a policy that if an employee exhausts his leave and works a partial shift, he is paid only for the actual hours worked." *Id.* at 1229. The previous policy was changed and under the new policy "salaried county employees are not subject to a deduction for absences of less than one work day." *Id.* The court found that while the county "may or may not have complied with the FLSA on this point in the past, [the] County clearly is in compliance now." *Id.* Further, the court found:

> Under § 541.118(a)(6), any inadvertent deductions will not result in the loss of the exemption if the employer reimburses the employee and promises to comply in the future. By revising its policy, the County has demonstrated its compliance with the regulation and its intent to comply in the future. Between April 1986 and the time of the revision, the County had inadvertently deducted salary from seven exempt employees for absences of less than one full day. The County has since reimbursed the employees for these deductions . . . .

Id. at 1229-30. *See also International Ass'n of Firefighters, Alexandria Local 2141 v. City of Alexandria, Va.*, 720 F. Supp. 1230, 1232 (E.D. Va. 1989), *aff'd*, 912 F.2d 463 (4th Cir. 1990); *Sarver v. City of Roanoke, Va.*, 29 Wage & Hour Cas. (BNA) 1442, 1444 (W.D. Va. 1989) (any perceived violation of the FLSA with respect to salary basis test was inadvertent and was remedied by use of the window of correction and does not result in loss of exemption for fire captains); *Chadwick v. Norfolk*, 29 Wage & Hour Cas. (BNA) 1407, 1408 (E.D. Va. 1988) (fire captains and lieutenants are salaried even though city had policy of making deductions for absences of less than a day where policy was cor-

rected in good faith compliance with regulation allowing for correction); *Harkins v. City of Chesapeake*, 29 Wage & Hour Cas. (BNA) 1399, 1400-03 (E.D. Va. 1988) (fire captains and lieutenants are paid on a salary basis even though the city had a policy of deducting on a per hour basis for time missed of less than a day when losses could not be covered by vacation or sick leave, where city reimbursed those who suffered deductions and promised to comply in the future); *Keller v. City of Columbus, Ind.*, 778 F. Supp. 1480, 1487 (S.D. Ind. 1991) (salary was subject to deduction but this was cured by using the window of correction and changing policy);[8] *Martin v. Pierce Processing, Inc.*, No. C-1-89-15, slip op. at 9 (S.D. Ohio Mar. 25, 1992) (employer intended to pay employees on a "salary basis," promised to comply with the Act in the future and offered to reimburse all employees for deductions made).[9]

The Fourth Circuit, and its district courts, clearly permit an employer to utilize the window of correction without first meeting the salary basis test. Malcolm Pirnie believes that this is the correct interpretation of the salary basis regulation and that, indeed, the plain wording of the regulation supports such a reading. The Second Circuit, however, is in conflict with the Fourth Circuit, having held in the present case that an employer must first meet all the specifics of the salary basis test before the employer is entitled to use the window of correction. Malcolm Pirnie believes that the Second Circuit's interpretation is incorrect because it results in effectively reading out of the regulation the window of correction. Under the Second Circuit's interpretation, an employer

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[8] The Court will note that much of the litigation in this area to date has involved public employers. The requirements of the salary basis test, 29 C.F.R. § 541.118, apply to both public and private employers; the regulations make no distinction.

[9] The slip opinion of this case is included in the appendix as Pet. App. F at 51a.

who discovers a mistake in his pay practices (other than a single clerical error) cannot use the window of correction and preserve the exempt status of his employees. Such a result would be unjust as well as unreasonable. The court should grant this Petition for Certiorari in order to resolve this split among the circuit courts.

B. The Second Circuit's Interpretation Of The Window Of Correction Is Contrary To The Language Of The Regulation And If Permitted To Stand Will Result In A Windfall In Overtime Pay To Otherwise Exempt Employees and Economic Hardship To Employers

The applicable regulation does not require that employers, before utilizing the window of correction, first compensate employees on a salary basis which meets all the particulars of the salary basis test. In the regulation, "salary basis" is defined in 29 C.F.R. § 541.118(a) and its subsections 1 to 6. The window of correction is contained in § 541.118(a)(6). Nowhere in that subsection or elsewhere in the regulation is it suggested that an employer's pay practices must meet all of the requirements of the salary basis test before availing itself of the window of correction. The window of correction is, in fact, part of the definition of "salary basis". Thus, the Second Circuit's interpretation is unreasonable since the plain language of the regulation explicitly permits employers who make improper deductions, inadvertently or for reasons other than lack of work, to correct their mistakes and still be in compliance with the salary basis test.

Under the Second Circuit's interpretation, the window of correction would effectively be eviscerated from the salary basis regulation, since virtually no employer who would seek and need to use the section's remediation provision could demonstrate that it had already compensated employees in accordance with all of the requirements of the salary basis test. And, if an employer was paying in accordance with the salary test it would have no need

to use the window of correction. Thus, the window of correction would not be available to the very employers who need it. By reading the availability of the window of correction as narrowly as it did, the Second Circuit has rendered the window of correction essentially useless to accomplish the primary purposes for which Petitioner submits the regulation was intended.

Furthermore, the regulation expressly states that in order for an employer to utilize the window of correction, the impermissible deduction must have been "inadvertent *or* . . . made for reasons other than lack of work." 29 C.F.R. § 541.118(a)(6) (emphasis added). *See also Brown v. Eckerd Drugs, Inc.*, 24 Wage & Hour Cas. (BNA) 114 (M.D.N.C. 1979) (employees suffered deductions in pay because of lack of work). Any impermissible deductions made by Malcolm Pirnie were for reasons other than lack of work. A proper reading of the regulation requires that meaning be afforded to the disjunctive phrase "inadvertent, or is made for reasons other than lack of work" found in the regulations. *Id.* at 115 (quoting 29 C.F.R. § 541.118(a)(6)). It is a hornbook rule of construction that every word in a regulation is deemed to have a meaning. *See Suwannee River Finance, Inc. v. United States*, 7 Cl. Ct. 556, 560 (1985). *See also Allen Oil Co. v. C.I.R.*, 614 F.2d 336 (2d Cir. 1980); C.J.S. Public Administrative Law & Procedure § 94 (1983) (generally the rules and regulations of a public administrative agency are subject to the same principles of construction applicable to the construction of statutes). The regulation plainly allows the use of the window of correction for reasons other than "inadvertence," otherwise the regulation would not use the term "or." [10]

The court in *Keller v. City of Columbus, Ind.*, discussed this very issue. It concluded that:

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[10] Of coure, the employer must have acted in good faith in order to avail itself of the window of correction. Good faith on the part of the employer in administering its pay practices is clearly a prerequisite implied in the regulation.

> Whether the policy allowing hourly deductions was inadvertent need not be considered. The regulation provides that the "window of correction" option applies when a deduction is inadvertent "*or* is made for reasons other than lack of work." 29 C.F.R. § 541.118(a)(6). Thus, if a policy allowed a deduction "for reasons other than lack of work" then the "window of correction" is open regardless whether the error was inadvertent. In this case, the policy allowed a deduction for missing work, not because there was a lack of work. The tangential debate about whether temporal duration of the policy qualified as "inadvertent" is unnecessary.

778 F. Supp. at 1487 (emphasis in original). Another recent case, *Martin v. Pierce Processing, Inc.*, No. C-1-89-15 supports this view as well. In that case the court stated:

> Here, it is clear that defendants' deductions were never made because work was lacking, but only when employees were voluntarily absent for personal reasons unrelated to whether work was available. Defendants have offered to reimburse all employees for deductions made. Further, defendant has not only promised to comply with the Act in the future, but is currently in compliance. All other aspects of this case point to a situation where the employer intended to pay his employees on a "salary basis," intended to operate within the letter and spirit of the Act, and sought to treat and pay his employees in a manner that was professional, considerate and equitable.
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> * * * *
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> The Court . . . finds that, subject to the conditions that (1) defendants reimburse their employees for the deductions made, and (2) defendants promise to comply with the Act in the future, the employees in question are, and were, exempt from the overtime payment provision of the Act.

Id., slip op. at 9.

Contrary to the plain language in the regulation, as read and applied by the courts in *Keller* and *Pierce Processing*, the Second Circuit found that Malcolm Pirnie was not entitled to invoke the window of correction because it did not meet the salary basis test in the first place. *Martin v. Malcolm Pirnie*, 949 F.2d at 616. The Second Circuit did not reach the question of whether deductions had been made due to "inadverten[ce] or . . . reasons other than lack of work." [11] 29 C.F.R. § 541.118(a)(6). In so finding, the court failed to follow the plain meaning of the regulation.

The problem with the Second Circuit's failure to interpret the window of correction in light of its plain meaning is the effect of such an interpretation on many employers. The ruling of the Second Circuit, if permitted to stand, will mean that *all* of an erring company's otherwise exempt employees must be paid overtime as if they were hourly employees, for two years prior to the time the corrective action was taken. This ruling will exact a devastating toll on businesses large and small. In this case alone, Malcolm Pirnie would be required to pay approximately two million dollars [12] in overtime compensation to 376 well-compensated otherwise exempt employees such as engineers, scientists and managers. The potential liability to employers in the United

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[11] The district court in *Dole v. Malcolm Pirnie, Inc.*, concluded that the better reading of the regulation is that the improper deductions must have been made *both* for reasons other than lack of work *and* inadvertently. *Dole v. Malcolm Pirnie, Inc.*, 758 F. Supp. at 906-07. The district court found that on the facts of the case, Malcolm Pirnie's deductions were "inadvertent." *Id.* at 908. Malcolm Pirnie urged the Second Circuit to affirm the trial court on the basis that the deductions were made for reasons other than lack of work and that Malcolm Pirnie had acted in good faith.

[12] Since Malcolm Pirnie already paid time-and-a-quarter to most of its exempt employees and straight time to the rest, approximately $500,000 is claimed by the Secretary to be due to Malcolm Pirnie's exempt employees.

States, who may have written policies which can be misconstrued or which contradict their actual practices, is in the tens of billions of dollars, as can be seen from the large amount of overtime wages found to be owing to a small number of exempt employees in the present case.[13]

This result is not because employees were misclassified as exempt in terms of their duties, but rather because a technical portion of the salary basis test was found to have been violated. And when Malcolm Pirnie attempted to correct any violations, pursuant to the window of correction, the Second Circuit found it was not entitled to use that portion of the regulation. If the Second Circuit's interpretation is permitted to stand, then responsible, model employers such as Malcolm Pirnie will be caught in a "catch-22" situation. They will be unable to correct even a de minimis number of improper deductions from salaried compensation—or even to correct a policy that resulted in *no* actual deductions—by any means other than full overtime payments to each salaried exempt employee who was subject to the employer's compensation policy for the entire two year statute of limitations period. And, because of the catastrophic consequences of admitting to and confronting payment mistakes, they will be vulnerable to threats, by even a few individual employees, of a lawsuit which, if successful, could invalidate the exemption for *all* the employer's exempt employees.

By not permitting Malcolm Pirnie to use the window of correction, the Second Circuit has effectively (1) so narrowed the window of correction that it is virtually useless to employers; (2) afforded a significant disincentive to employers who have acted in good faith to take corrective action when they do discover deficiencies in their salary administration system; (3) provided an un-

[13] The cost impact for state and local government employees in the State of California alone is some three billion dollars. *See* note 4; Pet. App. G.

anticipated and unearned windfall to well-compensated, otherwise exempt, employees; and (4) rendered the employers vulnerable to inflated settlements to avoid lawsuits by individual employees which could result in the loss of the exemption for all its employees.

We urge the Court to grant this Petition for Certiorari to both avoid serious injustice and prevent severe economic consequences to companies who have acted in good faith.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Petition for Certiorari be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OFAPPEALS
SECOND CIRCUIT

No. 1710, Docket 91-6138

LYNN MARTIN, Secretary of Labor,
United States Department of Labor,
Plaintiff-Appellant,

v.

MALCOLM PIRNIE, INC.,
Defendant-Appellee.

Argued Nov. 1, 1991

Decided Nov. 20, 1991

Marva M. Peace-Jackson, Washington, D.C. (David S. Fortney, Deputy Sol. of the U.S. Dept. of Labor, Monica Gallagher, Associate Sol., William J. Stone, Counsel for Appellate Litigation, Washington, D.C., Patricia M. Rodenhausen, Regional Sol., New York City, of counsel), for plaintiff-appellant.

Ronald M. Green, New York City (Gilbert J. Ginsburg, Epstein Becker & Green, P.C., Sandra J. Boyd, Gerard P. Cavaluzzi, Malcolm Pirnie, Inc., Robert L. Jauvtis, Bickel & Brewer, of counsel), for defendant-appellee.

Before OAKES, Chief Judge, FEINBERG and ALTIMARI, Circuit Judges.

ALTIMARI, Circuit Judge:

Plaintiff-appellant Lynn Martin, Secretary of the United States Department of Labor ("Secretary"), appeals from a judgment entered in the United States District Court for the Southern District of New York (Gerard L. Goettel, *Judge*), conditionally granting defendant-appellee Malcolm Pirnie, Inc.'s ("MP") motion for partial summary judgment and dismissing the action. The Secretary initiated the underlying action against MP seeking to remedy MP's alleged violation of the Fair Labor Standards Act ("FLSA" or "Act"), 29 U.S.C. § 201 *et seq.* (1988). Essentially, the Secretary contended below, and now argues on appeal, that MP violated the FLSA by failing to provide adequate compensation to a group of employees for overtime hours they worked. MP, in response, claimed that the employees at issue were "bona fide executive" employees and therefore were not covered by the overtime provisions of the FLSA. *See* 29 U.S.C. § 213(a)(1).

In order to attain "bona fide executive" status, an employee must meet both a salary basis and a duties test. *See* 29 C.F.R. § 541.1 (1990). On cross-motions for partial summary judgment, the parties submitted to the district court the sole issue of whether the employees in question—who are concededly well-paid and perform professional and managerial functions—met the salary basis requirement. Upon reviewing the applicable regulations, the district court concluded that, although these employees were required to work a certain number of hours each week, they were paid on a salary basis. The district court thus granted MP's motion for partial summary judgment. Because the Secretary withdrew its remaining claims, the district court dismissed the action with prejudice. Consequently, the central issue on this appeal is whether these highly compensated employees, who are normally characterized as professionals, are properly considered hourly, rather than salaried, employees if their compensation is

subject to reduction for working less than eight hour days.

For the reasons set forth below, we reverse the judgment of the district court.

BACKGROUND

MP is a corporation that specializes in providing environmental engineering, architectural, scientific and planning services to various industrial clients. MP employs approximately 900 individuals in its twenty-four nation-wide offices.

Once an employee joins MP, he or she is assigned a salary grade between 1 and 11. The basic issue in this case concerns MP's compensation scheme for employees in grades 6 through 9. These employees include engineers, accountants, architects, scientists, supervisors and administrators. By ordinary standards, grade 6 through 9 employees are well-paid professionals. Depending on their positions, they earn between $30,000 and $70,000 each year. Although employees in grades 6 through 9 are paid a fixed amount on a bi-weekly basis, they are required to work at least eight hours a day. MP compensates employees in grades 6 through 8 on a time-and-a-quarter basis for overtime hours worked, while it pays grade 9 employees straight time for overtime hours.

Until December 8, 1988, MP employment manuals provided that an employee in any pay grade who missed a fraction of a work-day would have a pro rata amount deducted from his or her pay, unless he or she made up the lost time or charged it to his or her vacation or sick leave. From May 1, 1987 to December 8, 1988, MP deducted a total of $3,269.78 from twenty-four different grade 6 through 9 employees' salaries for fractions of days that these employees missed and did not make up or charge to accrued leave time. On December 8, 1988, MP changed its policy regarding absences of less than a day. Under MP's new rules, grade 6 through 9 employees could charge

part-day absences to an overhead account rather than to their individual accounts. Moreover, MP ensured that these employees' wages would not be reduced if they worked less than an eight hour day. After initiating this new policy, MP reimbursed the twenty-four employees and former employees for all salary deductions MP had made as a result of their part-day absences.

Shortly after MP made these policy revisions, the Secretary initiated the underlying action in the United States District Court for the Southern District of New York, alleging that MP had violated the FLSA by compensating employees in grades 6 through 9 at less than a rate of time-and-a-half for overtime hours worked. *See* 29 U.S.C. § 207(a)(1) (requiring employers to compensate employees on a time-and-a-half basis for each hour they work in excess of the usual forty hour workweek). Accordingly, the Secretary sought to permanently enjoin MP from violating the overtime pay provisions of the FLSA and from withholding unpaid overtime compensation due MP employees. Additionally, the Secretary sought prejudgment interest on amounts unlawfully withheld, as well as costs.

In its answer, MP claimed that the employees in question were "bona fide executives" and therefore were not covered by the FLSA's overtime pay provision. *See* 29 U.S.C. § 213(a)(1) (exempting, *inter alia*, executives, managers and professionals from overtime pay requirements). In order to be considered a "bona fide executive," an employee must be paid on a salary basis. *See* 29 C.F.R. § 541.1. The primary dispute between the parties below was whether MP, by subjecting grade 6 through 9 employees to pay reductions as a result of part-day absences, had converted these employees from salary based to hourly employees. If so, MP could not claim that the employees were exempt under the "bona fide executive" exception to the FLSA. The parties each moved for summary judgment on this issue.

The district court concluded that even though the deductions for absences of less than a day may have been technically impermissible under the salary basis test, *see* 29 C.F.R. § 541.118(a), they were made inadvertently. *See Dole v. Malcolm Pirnie, Inc.*, 758 F.Supp. 899, 907-08 (S.D.N.Y.1991). Because the regulations permit an employer to correct an impermissible, but inadvertent, pay reduction, and, in so doing, preserve the affected employee's salaried status, *see* 29 C.F.R. § 541.118(a)(6), the district court concluded that MP's deductions for partial day absences did not, by themselves, render all grade 6 through 9 employees non-salaried. Accordingly, the district court granted MP's motion for partial summary judgment. However, the court conditioned the judgment on MP's promise to clarify its policy regarding partial day absences and to comply strictly with § 541.118(a). Because the Secretary had withdrawn all of its other claims, the district court entered judgment dismissing the action with prejudice. This appeal followed.

DISCUSSION

It is well-settled that a district court may grant a party's motion for summary judgment if the party can establish that "there is no genuine issue as to any material fact" and that, based on the facts presented, "[it] is entitled to judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). Here, the parties do not dispute the material facts at issue. Therefore, our only task is to determine whether the district court erred in concluding that, as a matter of law, MP's grade 6 through 9 employees met the salary basis test and thus were eligible for "bona fide executive" status. We review *de novo* the district court's judgment. *See Stroup v. GCS Service, Inc.*, 938 F.2d 20, 22 (2d Cir.1991); *Prunier v. City of Watertown*, 936 F.2d 677, 679 (2d Cir.1991).

Initially, we note that because the FLSA is a remedial act, its exemptions, such as the "bona fide executive" ex-

emption claimed in this case, are to be narrowly construed. *See Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392, 80 S.Ct. 453, 456, 4 L.Ed.2d 393 (1960); *Mitchell v. Lublin, McGaughty & Assoc.*, 358 U.S. 207, 211, 79 S.Ct. 260, 263, 3 L.Ed.2d 243 (1959). Indeed, an employer bears the burden of proving that its employees fall within an exempted category of the Act. *See Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97, 94 S.Ct. 2223, 2229, 41 L.Ed.2d 1 (1974); *Arnold*, 361 U.S. at 392, 80 S.Ct. at 452; *Donovan v. Carls Drug Co., Inc.*, 703 F.2d 650, 652 (2d Cir.1983). Consequently, MP must overcome the presumption that the "bona fide executive" exemption does not apply to its grade 6 through 9 employees. More specifically, MP must first prove that these employees were paid on a salary basis.

According to Department of Labor regulations accompanying the FLSA,

> [a]n employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compnsation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. *Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked.* This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work.

29 C.F.R. § 541.118(a) (emphasis added). Generally, an employer that maintains the discretion to reduce an employee's compensation as a result of the employee's hours or the quality of the employee's work, may not consider the employee to be paid on a salary basis.

Based on the definition contained in § 541.118(a), we have previously held that an employee who can be docked pay for missing a fraction of a workday must be considered an hourly, rather than a salaried, employee. *See Whitmore v. Port Authority of New York & New Jersey*, 907 F.2d 20, 21 (2d Cir.1990); *Donovan*, 703 F.2d at 652; *accord Abshire v. County of Kern*, 908 F.2d 483, 486 (9th Cir.1990) ("[s]ubjecting an employee's pay to deductions for absences of less than a day, including absences as short as an hour, is completely antithetical to the concept of a salaried employee."), *cert. denied*, —— U.S. ——, 111 S.Ct. 785, 112 L.Ed.2d 848 (1991). Most courts that have addressed the issue have agreed that if an employer has a policy of reducing an employee's compensation for fractions of days that the employee is absent from work, then the employer may not invoke the "bona fide executive" exemption with regard to that employee. *See Abshire*, 908 F.2d at 486; *Harrison v. District of Columbia*, Nos. 87-0809; -2275; 88-1028; -3223, 1991 WL 104260, at *5, 1991 U.S. District LEXIS 4992, at *14 (D.D.C. Apr. 16, 1991); *Wilks v. District of Columbia*, 721 F.Supp. 1383, 1385 (D.D.C.1989); *Banks v. City of North Little Rock*, 708 F.Supp. 1023, 1025 (E.D.Ark.1988); *Hawks v. City of Newport News*, 707 F.Supp. 212, 214-15 (E.D.Va.1988); *Persons v. City of Gresham*, 704 F.Supp. 191, 194 (D.Or.1988); *Knecht v. City of Redwood City*, 683 F.Supp. 1307, 1311 (N.D. Cal.1987); *cf. D'Camera v. District of Columbia*, 693 F.Supp. 1208, 1212 (D.D.C.1988); *but see Harris v. District of Columbia*, 709 F.Supp. 238, 242-43 (D.D.C.1989) (under employer's policy, no salary deductions were ever made for portions of days plaintiff-employees missed, thus court found that plaintiff-employees were eligible for bona fide executive exemption); *District of Columbia Nurses' Ass'n v. District of Columbia*, No. 87-1675, 1988 WL 156191, 1988 U.S. Dist. LEXIS 16500 (D.D.C. Jan. 28, 1988) (deductions for fractions of days were only made in rare circumstances in which employees had exhausted their leave, therefore such policy did not warrant a loss of exempt status).

Upon applying § 541.118(a)'s definition of "salary basis" to the facts of this case, the district court specifically noted, "we have our doubts as to whether [MP's] scheme of compensation comports with the requirements of [that section]." *Dole*, 758 F.Supp. at 903-04. Indeed, because MP subjected grade 6 through 9 employees to pay deductions on the basis of part-day absences, it is clear that, under the strict definition contained in § 541.118(a), these employees may not be considered salaried. *See Whitmore*, 907 F.2d at 21; *Donovan*, 703 F.2d at 652. However, as the district court recognized, our inquiry does not end at this point.

Section 541.118(a) specifically notes the existence of a number of exceptions to its mandate that, in order to be considered salaried, an employee must be paid a specified amount each week, notwithstanding the number of hours he or she works. Among the exceptions listed in the regulations is what is known as the "window of correction." *See* 29 C.F.R. § 541.118(a)(6). This provision allows an employer that makes an impermissible, but inadvertent, deduction to the compensation of an otherwise salaried employee to correct the error and thereby bring its compensation scheme into strict compliance with § 541.118(a). *See* 29 C.F.R. § 541.118(a)(6). Specifically, § 541.118(a)(6) provides:

> The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, *where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer*

> *reimburses the employee for such deductions and promises to comply in the future.*

(Emphasis added). Basically, the "window of correction" permits employers to treat otherwise eligible employees as salaried, regardless of the employer's one-time or unintentional failure to adhere to § 541.118(a)'s requirements. *See Abshire*, 908 F.2d at 489; *Knecht*, 683 F.Supp. at 1311 ("The exception in subsection (6) applies to one-time or inadvertent deductions, not to a settled policy of subjecting the pay of employees to reductions.").

The district court concluded that MP could invoke the "window of correction" in this case. First, the district court determined that MP did not have a *policy* of docking pay from grade 6 through 9 employees. In making this assessment, the court relied on the fact that over the period in question, MP only made cash dockings to twenty-four employees totaling $3,269.78. Because the occurrences of docking were infrequent, the court determined that the deductions were not the result of an underlying pattern or scheme. Second, the court noted that MP has reimbursed those employees who suffered a pay loss as a result of its pay deductions for partial day absences. Finally, the court observed that MP revised its policy and promised to comply with § 541.118(a) in the future. Therefore, the district court found that MP could use the "window of correction" to "retroactively restore exempt status to [grade 6 through 9] employees who, *inter alia*, had their pay subject to reduction for absences of less than a day." *Dole*, 758 F.Supp. at 904. We disagree.

Based on the undisputed facts, we cannot find that MP met its burden of proving that the "window of correction" was available to it. Initially, we note that MP's Policy Guide, which was distributed to all new employees, stated unequivocally that:

> If a staff member loses time because of inclement weather, car problems, or medical reasons, s/he may

> arrange with his/her Group Manager to make up the time, or to charge it to vacation or optional holidays; otherwise it will be treated as an absence without pay. Whatever the arrangement, it should be recorded properly on the time sheet.

Thus, the Policy Guide clearly allowed proportional salary deductions for *all* employees—including those paid at grade levels 6 through 9—who did not complete full eight hour days. Similarly, MP's Handbook of Information for Staff provided:

> Time lost from work because of snow, car trouble, etc. is usually considered as absence without pay, but arrangements may be made with your Group Leader to make up the time or to charge it to vacation or optional holidays.

Here again, MP did not suggest that its policy of docking pay for portions of days that were missed was applicable only to lower pay grade employees. Moreover, MP's Director of Human Resources, John O'Neill, indicated to a Department of Labor Investigator that employees in pay grades 1 through 5, who MP conceded were subject to FLSA overtime requirements, were paid in essentially the same manner as those employees in grades 6 through 9. Indeed, the investigator ascertained that quarterly pay docking reports did not distinguish between employees in grades 1 through 9. Additionally, the investigator submitted an affidavit detailing interviews with eight employees in grades 6 through 9 who each understood that under MP's policy they would be docked pay for working less than a forty hour workweek unless they made up the time or charged it to sick leave or vacation leave. Finally, we note that a company's general requirement that its employees work at least eight hours in a day strongly suggests that the company views these employees as hourly and not salaried.

Although the district court emphasized that only twenty-four of the approximately 400 employees in ques-

tion actually had amounts deducted from their paychecks, it is clear that the remaining grade 6 through 9 employees were required to deduct from personal leave time or make up the hours they missed in order to avoid salary deductions. Furthermore, "[s]ection 541.118(a) does not require that a deduction for an absence of less than a day *actually* have been made, but only that an employee's pay be 'subject to' such a deduction." *Abshire*, 908 F.2d at 487 (footnote omitted); *see also Banks*, 708 F.Supp. at 1025 (exemption may be lost even if no actual deductions have been made); *Hawks*, 707 F.Supp. at 215 (same); *Persons*, 704 F.Supp. at 194 (same); *Knecht*, 683 F.Supp. at 1310 (same). Here, it is apparent that the employees were subject to deduction.

In sum, the evidence before the district court clearly showed that until December 8, 1988, MP maintained a policy of docking pay to grade 6 through 9 employees for fractions of the workday they missed. Thus, MP was not entitled to invoke the "window of correction" with regard to these employees and, as a result, they may not be considered to have been paid on a salary basis. Accordingly, the district court erred in granting MP's motion for partial summary judgment.

By enacting the overtime provision of the FLSA, Congress intended to ensure that appropriate overtime payments are made to eligible employees, rgardless of the magnitude of each employee's monthly compensation. Because we find that grade 6 through 9 employees were not exempt under the FLSA, we conclude that MP impermissibly withheld overtime payments that were due and owing.

CONCLUSION

Based on the foregoing, we reverse the judgment of the district court dismissing the action and remand this case for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
S.D. NEW YORK

No. 89 Civ. 3554 (GLG)

ELIZABETH DOLE, Secretary of Labor,
United States Department of Labor,
Plaintiff,

v.

MALCOLM PIRNIE, INC.,
Defendant.

March 4, 1991

Office of the Sol. U.S. Dept. of Labor, New York City (Percy S. Miller, of counsel), for plaintiff.

Epstein Becker & Green, P.C., New York City by Gilbert J. Ginsburg, and Robert L. Jauvtis (Bickel & Brewer, New York City of counsel), for defendant.

OPINION

GOETTEL, District Judge:

The narrow issue presented by these cross-motions for partial summary judgment is whether professional and managerial employees were exempt from the overtime requirements of the Fair Labor Standards Act ("FLSA") because the salary test set forth in 29 C.F.R. § 541.118 was satisfied, notwithstanding the fact that deductions for absences of less than a day were made from the paychecks of some of these employees.[1]

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[1] Left for determination in the future is the issue of whether 43 Malcolm Pirnie employees, considered exempt by the company, were indeed entitled to that status because the nature of their jobs satisfied the "duties test" in the regulations. *See* 29 C.F.R. §§ 541.1. 541.2, 541.3.

BACKGROUND

Defendant Malcolm Pirnie, Inc. ("MP") is a consulting professional engineering firm with a major specialty in the area of water and waste water treatment for municipalities and industrial companies. Its roughly 900 employees are classified into eleven salary grades of which Levels 1 to 5 are considered non-exempt and Levels 6 to 11 are considered exempt. The jobs represented by grades 6 through 9 include positions such as engineers, accountants, architects, scientists, supervisors and administrators. Senior managers and officers of the corporation are grades 10 and 11. The exempt employees are well-compensated, earning salaries from over $30,000 per year to over $70,000 per year. When hired, each exempt employee is told what his or her monthly salary will be. Employees are paid twice a month. All MP employees are required to work forty hours per week and eight hours per day.

The FLSA requires that all employees working longer than forty hours per week be paid overtime at a rate of one and one-half times their regular hourly rate unless an exemption is applicable. MP considered its employees in grades 6 through 9 exempt from these overtime provisions. Nevertheless, the firm's policy was to pay overtime to employees in grades 6 through 9 in order to compensate them for the many hours they often worked beyond the required hours. Thus, an exempt employee working in excess of eight hours in a day or of forty hours in one week would receive overtime compensation. Though these employees were paid a monthly salary, in order to arrive at a rate at which to pay overtime, an hourly rate was calculated for each employee by dividing his or her total monthly compensation in half and then by 80. Grades 6 to 8 were paid overtime at an hourly rate of time and a quarter; Grade 9 received straight time pay. These practices were apparently typical of the industry.

During the period of May 1, 1987 to December 8, 1988, employees kept their own time sheets on which they

charged their time to client projects (which would later be billed) or to various overhead accounts. Among these accounts were accrual accounts such as vacation and personal illness, holidays, and absence without pay. Absences of a day or more could be charged by the exempt employees to their accrued sick or vacation time, or to absence without pay. Absences of less than a day, resulting for instance from tardiness or car trouble, would also be charged to the overhead accounts. The corporate policy guide stated that:

> [i]f a staff member loses time because of inclement whether, car problems, or medical reasons, s/he may arrange with his/her Group Manager to make up the time, or to charge it to vacation or optional holidays; otherwise it will be treated as absence without pay. Whatever the arrangement, it should be recorded properly on the time sheet.

Malcolm Pirnie Policy Guide, at 6-23. This language was echoed in the Malcolm Pirnie Handbook of Information for the Staff.[2]

During the period of May 1, 1987 to December 8, 1988, 24 employees in grades 6 through 9 had their compensation reduced after recording an absence of less than a day in the "absence without pay" column on their time sheet. The total amount of the payroll deductions was $3269.78. This money was later reimbursed to the affected employees.

On December 8, 1988, MP amended its policy concerning absences of less than a day and specifically instructed its employees in grades 6 through 11 to charge absences

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[2] It is unclear how employees were made aware of this corporate policy. The Policy Guide was distributed to the managers and officers of the company. Language in the introduction to the Handbook suggests that it was intended to be distributed to all new employees as an orientation and was intended to be a source of information for common questions.

of less than a day to a new overhead account called "Paid Absence" and not to their individual leave accounts.

In May 1989, the Department of Labor commenced this suit alleging that employees in MP's pay grades 6 through 9 during the period of May 1, 1987 through December 8, 1988 were not exempt from the overtime provisions of the FLSA and were therefore entitled to payment of overtime wages at the rate of time and one half their regular rate of pay. At stake is a sum of roughly $500,000 which is the difference between the actual overtime compensated at the MP rates and that time calculated at the statutory time and one half.

DISCUSSION

A. *Summary Judgment*

Federal Rule of Civil Procedure 56(c) provides that the trial judge shall grant summary judgment if there is no genuine issue as to any material fact and if the moving party is entitled to judgment as a matter of law. The threshold inquiry is whether there are genuine factual issues that must be resolved by a finder of fact because they may reasonably be resolved in favor of either party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). On occasion, a case will be presented in which there is no dispute about the material facts but only as to their significance. Summary judgment is appropriate in such situations, *Transamerica Delaval Inc. v. Citibank, N.A.*, 545 F.Supp. 200 (S.D.N.Y.1982), so long as all inferences are drawn against the moving party, *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962) (per curiam), and reasonable minds could not differ as to the import of the evidence before the court, *Cable Science Corp. v. Rochdale Village, Inc.*, 920 F.2d 147, 151 (2d Cir.1990).

The material facts here are not in dispute. The parties agree that 24 MP employees in salary grades 6 through

9 were subjected to reductions in compensation as a result of their having recorded their time in the "absence without pay" account on their time sheets. The parties also agree that these parties were reimbursed for the deductions and that MP has promised to comply with Department of Labor regulations in the future. Additionally, there is no question that both the MP Policy Guide and Handbook instructed *all* employees losing time because of inclement weather, car problems, or medical reasons to make up the time or charge it to accrued time or an "absence without pay" account. What the parties dispute is whether the statements made in this corporate literature and the fact that such reductions were actually made in the compensation of 24 employees signified that the compensation of all employees was subject to reduction thereby destroying the exempt status of all MP employees in grades 6 through 9 during the period in question.

MP makes two arguments in support of its position that the employees in grades 6 through 9 were exempt from the FLSA overtime provisions. First, MP contends that these employees were salaried because their compensation was predetermined and not related to the number of hours actually worked. Second, MP argues that even if the payroll practices applied to these employees was not structured to satisfy the salary basis test of 29 C.F.R. § 541.118(a), by changing this policy, reimbursing the employees and promising to comply, the exempt status of these employees was preserved by a "window of correction" set forth in 29 C.F.R. § 541.118(a)(6). In its motion for partial summary judgment, the Department of Labor responds that the compensation of these employees was directly linked to the number of hours worked and that these employees were never exempt, therefore, from the provisions of the FLSA. The net result, the Department contends, is that the "window of correction" is not available at all to MP. These arguments will be considered below.

B. *Salaried or Hourly?*

The first question posed by the parties is whether the MP employees in grades 6 to 9 were salaried or hourly employees. After carefully considering the matter, we believe that this question need not be answered in order to successfully resolve the dispute between the Department of Labor and Malcolm Pirnie, Inc. However, the underlying jurisprudence, in addition to the applicable facts, provide the context in which the availability of the "window of correction" to MP must be addressed. Therefore, we will briefly sketch the relevant considerations.

Under 29 U.S.C. § 207(a) of the Fair Labor Standards Act, any employees working over forty hours per week must receive compensation for this extra time at a rate not less than one and one-half times the regular rate at which they are employed. A statutory exemption to this rule is provided for employees employed in a "bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1).[3]

The scope of the § 213(a)(1) exemptions is defined in Department of Labor regulations found at 29 C.F.R. § 541.1, 29 C.F.R. § 541.2, and 29 C.F.R. § 541.3. The regulations demand that a person for whom the managerial exemption is claimed must be compensated on a "salary basis," 29 C.F.R. § 541.1(f), and that persons for whom the administrative or professional exemptions are claimed must be compensated on a "salary or fee basis," 29 C.F.R. § 541.2(e)(1); 29 C.F.R. § 541.3(e). An employer is not required by the FLSA to pay overtime to

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[3] Exemptions to the FLSA are narrowly construed in order to further Congress' remedial goal of providing employment protection. *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392, 80 S.Ct. 453, 456, 4 L.Ed.2d 393 (1960). The employer is burdened with the duty of proving affirmatively that its employees come within these exemptions, *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97, 94 S.Ct. 2223, 2229, 41 L.Ed.2d 1 (1974), by "clear and affirmative evidence," *see Donovan v. United Video, Inc.*, 725 F.2d 577, 581 (10th Cir.1984).

any employee whose terms of employment satisfy the salary basis test of the regulations.[4] The Department of Labor maintains that the compensation plan and payroll practices applied to the MP employees in grades 6 to 9 do not satisfy this test of these regulations, as it is interpreted by 29 C.F.R. 541.118, resulting in the exemption being inapplicable to these employees.

It is well established that under the Department of Labor regulations, if an employee is considered salaried, his or her compensation may not be subjected to reduction for absences of less than a day. A salaried employee is compensated not for the amount of time spent on the job, but rather for the general value of services performed.[5] Thus, the wey to our inquiry is whether the compensation plan, as structured, subjects the salary of the managerial, professional or administrative employee to reduction. "Either pay is fixed and immutable, and not subject to such deductions, or it is contingent." *Abshire v. County of Kern*, 908 F.2d 483, 487 (9th Cir.1990) (rejecting defendant's argument that employees are salaried because no deductions were actually made), *cert. denied*, —— U.S. ——, 111 S.Ct. 785, 112 L.Ed.2d 848 (1991). Fixed pay is a "salary;" pay which varies according to the quantity or quality of work results in hourly status.[6]

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[4] The regulations also require that the duties of the exempt employees meet certain criteria. With respect to the MP employees, the parties agree that the duties test has been satisfied.

[5] We have not been asked to decide whether paying overtime to salaried employees, thus increasing their compensation in relation to the hours worked, would affect their exempt status. *See Brock v. Claridge Hotel and Casino*, 846 F.2d 180 (3d Cir.), *cert. denied*, 488 U.S. 925, 109 S.Ct. 307, 102 L.Ed.2d 326 (1988). We acknowledge that payment of overtime *qua* overtime to an employee is an indicator of hourly status, *see id.*, but since traditionally many salaried employees receive bonuses which reward them for extra time put into a job, we see little reason why the payment of overtime would negate the exempt status of an employee.

[6] MP argues that the employees in grades 6 through 9 received a predetermined salary as required by the regulations because they

It is the potential for reduction that destroys exempt status.

Here, MP has acknowledged that some barred reductions did occur, albeit in a comparatively small number of cases. Moreover, MP concedes that its method of accounting for employee time perior to December 8, 1988 created the potential for these reductions. For example, MP admitted at oral argument that under its former practice, if an employee in grades 6 through 9 missed two hours of work, chose not to make up that time, and recorded it on the time sheet as "absent without pay," that employee would be docked two hours of pay. Furthermore, as MP also acknowledged, if that same employee missed two hours of work, then worked two hours to make up that time, the employee would not be paid overtime. Indeed, pointing to these practices, the Department of Labor contends that because some MP employees in grades 6 through 9 were docked pay pursuant to a stated corporate policy which theoretically subjected the compensation of all employees in these salary grades to reduction, none of the employees in those grades can be considered salaried and that they are all therefore eligible for statutory overtime. MP has maintained that these deductions were irrelevant [7] and that, therefore, the exempt status of the employees in grades 6 through 9 was not jeopardized.

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were told, when hired, what their annual salaries would be. However, a sum fixed in advance would not satisfy the concept of "salary" as used by the regulation because the regulation's plain language treats "salary" as a single, non-varying amount. If an MP employee in grades 6 through 9 missed less than a day of work without making up the time or charging it to an accrual account, if the company procedures listed in the corporate literature were followed to the letter, this employee's salary would be reduced. Thus, it was very possible for the employee's salary to vary across pay periods as a function of the actual hours worked and the compensation cannot be considered predetermined.

[7] MP argues that these deductions were made rarely and the compensation affected was de minimus. A number of courts have rejected this argument, holding that employees whose pay is "sub-

As stated earlier, resolution of this interesting question is not essential to disposition of these summary judgment motions. We will note, in passing that we have our doubts as to whether this scheme of compensation comports with the requirements of § 541.118(a). However, at this point, this court declines to characterize the status of the MP employees in grades 6 to 9 and assumes for the purposes of the next issue raised by the parties that the employees are not salaried.

C. *The Window of Correction*

The critical issue raised by these motions is whether the MP employees in grades 6 through 9 may retain their exempt status because MP has complied with a "window of correction" afforded by 29 C.F.R. § 541.118(a)(6) ("subsection (6)"). This regulation states:

> The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the

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ject to reduction" for such absences are not salaried, even if no deductions have actually been made. *See, e.g., Banks v. City of North Little Rock*, 708 F.Supp. 1023, 1025 (E.D. Ark.1988) (no showing of actual deductions is needed); *Hawks v. City of Newport News, Va.*, 707 F.Supp. 212, 215 (E.D.Va.1988); *Persons v. City of Gresham, Or.*, 704 F.Supp. 191, 194 (D.Or.1988). *But see District of Columbia Nurses' Assoc. v. District of Columbia*, (reported at 1988 WL 156191) (D.D.C. Jan. 28, 1988) (holding that the occasional deduction made when the employee had exhausted his leave did not preclude exempt status).

In addition, MP maintains that, in reality, the compensation plan functioned differently from both how it was described in the company literature and how it was perceived by those employees who had made entries subjecting their pay to reduction and indeed, it never intended the directives in the employee literature to apply to employees in grades 6 through 9. These arguments are more applicable to the issue of whether MP may avail itself of the remedial provisions of the "window of correction."

> employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

The effect of this "window of correction" is to retroactively restore exempt status to employees who, *inter alia*, had their pay subjected to reduction for absences of less than a day.

Whether or not the "window of correction" is available to an employer who had been making unauthorized reductions in the pay of salaried employees is a matter of first impression in this circuit. We have assumed for the purpose of this argument that the MP employees were not salaried within the meaning of the regulations. The Department of Labor argues that the "window of correction" is only available to a company who can show from the outset that its employees were entitled to exempt status. *See Dole v. Walker and Armstrong*, slip op., at 5, No. CIV-88-1371-PHX-RCB (D.Arizona Apr. 26, 1990) (defendant was not entitled to use the "window of correction" because its deductions could "not be characterized as one-time or inadvertent deductions but rather reflect[ed] a settled policy of subjecting the pay of its employees to improper deductions"). The Department of Labor asserts that if this court had found that the MP employees were not "salaried employees" within the meaning of § 541.118(a), subsection (6) is simply not available to the offending company as a panacea.[8]

We believe the rule urged by DOL is too rigid. Subsection (6), by requiring examination of the facts of a par-

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[8] Here, we have made no such finding, assuming instead for the purposes of this analysis, that the finding was made.

ticular case, suggests a more fluid approach. For example, under this subsection, it is appropriate to consider such factors as the employer's intention in making the reduction to the employee's salary. Furthermore, by allowing remediation, subsection (6) creates an incentive for the employer to comply with the regulations. Under the rule suggested by the Department of Labor, any employer whose payroll practices would technically bar exempt status for its employees would never be able to take advantage of the "window of correction". Therefore, no employer would comply with the provisions of § 541.118 until it was forced to do so. Because the FLSA is a remedial statute, intended to benefit employees, its exemptions are to be narrowly construed while its remedial provisions must be construed liberally so that the words will accomplish the purpose at which the act is aimed. The Department of Labor's view of when the "window of correction" may be applied defeats the underlying purpose of subsection (6). We hold that a finding that employees are not salaried within the meaning of § 541.118 does not necessarily preclude use of the "window of correction."

Having concluded that the "window of correction" is available to MP, irregardless of how the underlying issue would be resolved, we turn to examine its actual application. MP reimbursed its employees who had suffered a loss of pay and informed its personnel of a revised leave policy for employees in grades 6 through 9.[9] In an affidavit signed June 27, 1990, MP's Vice President of Finance, Administration and Human Resources promised to comply in the future with the requirements of 29 C.F.R. § 541.118(a)(6).[10] MP argues that it availed it-

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[9] Under the revised policy, employees in grades 6 through 11 will charge sick days, vacation time and optional holidays in full-day increments. Absences of less than a full day are to be charged to a new account "Paid Absence".

[10] A promise to comply with the provisions of subsection (6) is somewhat meaningless. We believe, as evidenced by the restated MP policy, that the correct promise is to comply with all of the pro-

self of the "window of correction" by undertaking these remedial steps, as required by the regulation, and directs our attention to cases where the very steps taken by MP were considered proper utilization of the "window." For example, in *International Association of Fire Fighters, Alexandria Local 2141 v. City of Alexandria, Va.*, 720 F.Supp. 1230 (E.D.Va.1989), *aff'd*, 912 F.2d 463 (4th Cir.1990), the city had a policy of docking captains and lieutenants employed by the fire department for absences of less than one day. The policy was changed to conform with federal regulation and 26 employees who had experienced unauthorized reductions were reimbursed. The court found that by revising its policy, the City demonstrated its compliance with the regulation and its intent to comply in the future. This, along with reimbursing affected employees, was deemed proper utilization of the "window of correction"; the court held, therefore, that the City had satisfied the salary test of 29 C.F.R. § 541.118(a). *See also Hartman v. Arlington County, Va.*, 720 F.Supp. 1227 (E.D.Va.1989) (current compliance satisfies "salary test" of 29 C.F.R. § 541.118(a)), *aff'd*, 903 F.2d 290 (4th Cir.1990); *Harkins v. City of Chesapeake*, slip. op., No. 88-25-N (E.D.Va. Dec. 2, 1988).

We decline to follow the analysis pursued in the cases cited by MP because those courts only focused on the defendants' current compliance, assuming that the questioned deductions were inadvertent even when an established policy of making such deductions existed. *See, e.g., Fire Fighters Local 2141*, 720 F.Supp. at 1232. Subsection (6) establishes conditions which must be satisfied even before the current compliance and reimbursement necessary to preserve the exempt status of the disputed employees are considered. "[W]here a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will

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visions of § 541.118. MP should submit, therefore, a revised affirmation.

not be considered to have been lost if the employer reimburses the employee for such deduction and promises to comply in the future." 29 C.F.R. § 541.118(a)(6). Thus, before the employer's remedial actions may be assessed, it must be clear that the improper deductions were made only for the reasons set forth in the regulation. The reasons for the improper deductions were never addressed by the cases upon which MP relies. We will not, in contrast, allow use of the "window of correction" unless the regulation is fully satisfied.

MP argues that the "window of correction" is available because the deductions were made for reasons other than lack of work. Accepting MP's unchallenged representation that the firm was very busy and in fact growing, the argument is that the deductions were the result of an employee not working as opposed to work not being available for the employee to perform. The question is whether the phrase "made for reasons other than lack of work" encompasses the scenario MP proposes.

We must defer to an administrator's interpretation of its own regulations. *Udall v. Tallman*, 380 U.S. 1, 17, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965). The problem here is that no interpretation of the phrase "reasons other than lack of work" has been made by the Administrator. Without the guidance of an administrative interpretation, we must then turn to standard statutory construction. In determining the scope of a regulation, we look first to its language, *see United States v. Turkette*, 452 U.S. 576, 580, 101 S.Ct. 2524, 2527, 69 L.Ed.2d 246 (1981), giving the "words used" their "ordinary meaning," *Richards v. United States*, 369 U.S. 1, 9, 82 S.Ct. 585, 591, 7 L.Ed.2d 492 (1962).

The paramount concern of subsection (6) is that a salaried employee's compensation not be reduced if work is not available for him or her to perform. Indeed, this notion appears twice within the one paragraph of this regulation. While the regulation makes it clear that an

employer may not use the "window of correction" when the salaried employee's compensation has been reduced because there is no work available, there is no suggestion that reductions for other reasons would be a bar to using the "window of correction."

The language of subsection (6) contains no ambiguity and we must conclude that "lack of work" means precisely that. No argument has been made by the Department of Labor that the MP reductions were made as a result of no work being available. Instead, the plaintiff's entire argument centers on the structure of the compensation plan. Because there has been no contention that the deductions in question were made as a result of work lacking for the employee, we must hold that one of the available criteria precedent to use of the "window of correction" by MP has been satisfied.

The regulation poses the conditions in the alternative. Its words indicate that so long as the improper deductions were made for "reasons other than lack of work" *or* inadvertently, the "window of correction" may be used by an employer who has reimbursed the affected employees and promised to comply with the regulations in the future. Under a plain reading of the regulation, we could therefore conclude that because 1) MP made the improper deductions for reasons other than lack of work and 2) it has reimbursed the affected employees and promised to comply with the regulation in the future, MP may use the "window of correction" to preserve the exempt status of the disputed employees in grades 6 through 9.

However, we have grave doubts that the Department of Labor intended the regulation to be read alternatively with respect to the reasons underlying the barred deduction. We believe that a better reading of the regulation would take these conditions conjunctively, requiring that the improper deductions have been made both for "reasons other than lack of work" and "inadvertently." *See Mc-*

Nally v. United States, 483 U.S. 350, 358-60, 107 S.Ct. 2875, 2880-82, 97 L.Ed.2d 292 (1987) (reading disjunctive prohibitions of 18 U.S.C. § 1341 in conjunction); *United States v. Schwartz*, 924 F.2d 410, 416 (2nd Cir.1991). This application is necessary so that employers, whose payroll policies preclude exempt status for employees under 29 C.F.R. § 541.118(a) because the employees' salaries have been subjected to reduction on the basis of the quality or quantity, may not escape the strictures of the Fair Labor Standards Act with merely a slap on the wrist. For example, if the regulation were read in the alternative, an employer who purposely reduced the salaries of its professional employees every time they were late for work would be able to take advantage of the "window of correction" because the reductions were made for "reasons other than lack of work." It is the subjecting of salary to reduction on the basis of quantity of work performed that precludes exempt status for these employees; to allow the employer to use the "window of correction" so easily would undercut the need for employer compliance with 29 C.F.R. § 541.118(a) prior to a Department of Labor investigation. Thus, we consider it essential that, in addition to having been made for reasons other than lack of work, the improper deductions also have been made inadertently. This would prevent the incongruous situation of employers cynically undertaking corporate policies which subject the salaries of their professional, managerial and administrative employees to reduction for reasons other than lack of work, knowing that the exempt status of the affected employees would be restored through reimbursement and a promise to comply, if the employer is caught. With that view, we will now consider whether the improper deductions made by MP were inadvertent.

The concept of inadvertence suggests a mistake or an oversight. One cannot be inadvertent while administering procedures which are deliberate and calculated. *See Knecht v. City of Redwood City*, 683 F.Supp. 1307, 1311

(N.D.Cal.1987). Those few courts addressing "inadvertence" have held that the subsection (6) exception was available to cover the fortuitous mistake made heedlessly. *See id.; Abshire*, 908 F.2d at 488-89. The Ninth Circuit has stated that:

> the thrust behind the regulations is to facilitate the determination whether an employer has a general policy of deducting for absences of less than a day or whether a deduction is made as a result of inadvertence or error. The exception in subsection (6) is for an employer that makes a one-time improper deduction and then corrects its error.

Abshire, 908 F.2d at 489.[11] *See also Dole v. Walker and Armstrong*, No. CIV-88-1371-PHX-RCB, *supra*.

The first inquiry is whether there was a general policy at MP which required that employees in grades 6 to 9 be docked pay for absences of less than a day. MP contends that at the time it developed its personnel policies and wrote its handbook, it intended the policy to apply only to the non-exempt employees in grades 1 through 5. Affidavit of John T. O'Neill (June 26, 1990), at ¶ 12. Moreover, it maintains that it had no idea at the time that its exempt employees would misconstrue the instructions contained in the Policy Guide and Handbook and charge time

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[11] Defendants correctly note that *Abshire* can be distinguished on the basis that the County never sought to avail itself of the "window of correction." Indeed, the Ninth Circuit noted that "[t]his provision [§ 541.118(a)(6)] is of no relevance in the case of an employer that . . . has adopted an express policy of deducting for part-day absences when an employee has not accrued leave, and has continued to adhere to such policy." *Abshire*, 908 F.2d at 489. This might be read to suggest that subsection (6) would cover situations in which there was current compliance. However, it should be noted that the court did draw a distinction between an inadvertent deduction and a policy of making deductions, which leads us to conclude that even the Ninth Circuit required inadvertence and compliance as prerequisites for application of the "window of correction." *See id.* at 488-89.

to "absence without pay." MP asserts that its actual policy with respect to absences of less than a day was to have the employee discuss his absence with his supervisor and then record this time in the appropriate overhead account (sick time or vacation) or as "Paid Absence." *Id.* at ¶ 11. In that regard, it argues that no employee in grades 6 through 9 was ever directed to record an absence of less than a day as "absence without pay." Indeed, by affidavit, some employees have stated that they never charged absences of less than one day to the "absence without pay" account nor did they feel obliged to do so.

The Department of Labor notes both the Employee Handbook and the Policy Guide indicate that when an employee was absent from work for less than a day, that employee was to make up the time, charge it to an accrual account or to record the time as "absent without pay," resulting in a salary reduction. Moreover, the investigator for the Department of Labor has stated, by affidavit, that the employees she interviewed understood that if they were absent from work and did not make up the time or charge it to an overhead account, they would be docked pay. Affidavit of Patricia Silberman (September 27, 1990), at ¶¶ 10-17. We note that none of the eight employees interviewed by the Department of Labor ever had been docked.

Another fact to be considered in determining whether a policy of docking exempt employees was in operation, is that over the 19 month period in question, cash dockings representing approximately 100 hours of work and involving 24 employees were made. However, during that same period roughly 400 employees worked well over one million hours. Thus, the acutal deductions made were *de minimis*.

The record suggests that, corporate literature notwithstanding, the intended and actual policy of MP with respect to the employees in grades 6 through 9 was to not

dock them for absences of less than a day. The Department of Labor has not made a showing to contradict this conclusion other than its investigator's affidavit containing the statements of some employees indicating otherwise. The circumstances, taken in total, suggest that the actual deductions made by MP were the result of confusion on the part of the employees who chose to self-dock. Indeed, Ms. Silberman's affidavit indicates that she was told by MP that some of the deductions were made by employees in their first week of employment. It is easy to see how an employee would make such an error because he or she was unaware of an informal policy.

Two errors in this case led to the dockings—both of these can be characterized as inadvertent. The first error is attributable to MP who erred in the drafting of its time sheets and its corporate literature, failing to foresee how some exempt employees might take the instructions literally. The second error is on the part of the employees who self-docked because they were unaware of how the company actually handled absences of less than a day by employees in grades 6 to 9.

Finally, though the dockings were not a one-time error, *see Abshire*, 908 F.2d at 489, their occurrence was infrequent enough to negate the possibility of a pattern. Thus, we conclude that the dockings were inadvertent and, in the context of subsection (6), not the result of a general policy requiring that the salaries of exempt employees be subjected to reduction for absences of less than a day.

The task here has been to interpret the undisputed facts presented in order to determine their significance. Though the explanation of why the bared reductions were made is disputed, summary judgment is nevertheless appropriate. We find that the conditions for proper utilization of the "window of correction" have been satisfied by Malcolm Pirnie, Inc. and the exempt status of the employees in grades 6 through 9 has been preserved by the firm's

reimbursement of the affected employees, and its promise to comply with the FLSA regulations in the future.

One final observation is in order. We believe that this matter came to the attention of the Department of Labor because overtime was paid to the professionals employed by MP to compensate them for many hours worked beyond a normal forty hour workweek. It is somewhat ironic that none of this litigation would have occurred if MP had not been generous in its treatment of its exempt employees.

CONCLUSION

Partial summary judgment is granted in favor of the defendant, Malcolm Pirnie, Inc., conditioned upon the company submitting a new affirmation of its promise to comply with 29 C.F.R. § 541.118(a). (*See* footnote 10, *supra.*) The Department of Labor's motion for summary judgment is denied with the same condition. Malcolm Pirnie, Inc. is ordered to submit a new affirmation within ten days of the date of this decision.

SO ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventh day of February one thousand nine hundred and ninety-two.

Docket Number: 91-6138

LYNN MARTIN, Secretary of Labor,
United States Department of Labor,
Plaintiff-Appellant,

v.

MALCOLM PIRNIE, INC.,
Defendant-Appellee.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Defendant-Appellee Malcolm Pirnie, Inc.,

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
ELAINE B. GOLDSMITH
Clerk

/s/ [Illegible]
Chief Deputy Clerk

APPENDIX D

§ 213. Exemptions

(a) The provisions of section 206 (except subsection (d) in the case of paragraph (1) of this subsection) and section 207 of this title shall not apply with respect to—

(1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of subchapter II of chapter 5 of Title 5, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities); or

(2) Repealed. Pub. L. 101-157, § 3(c)(1), Nov. 17, 1989, 103 Stat. 939.

(3) any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or nonprofit educational conference center, if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33⅓ per centum of its average receipts for the other six months of such year, except that the exemption from sections 206 and 207 of this title provided by this paragraph does not apply with respect to any

employee of a private entity engaged in providing services or facilities (other than, in the case of the exemption from section 206 of this title, a private entity engaged in providing services and facilities directly related to skiing) in a national park or a national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture; or

(4) Repealed. Pub. L. 101-157, § 3(c)(1), Nov. 17, 1989, 103 Stat. 939.

(5) any employee employed in the catching, taking, propagating, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other acquatic forms of animal and vegetable life, or in the first processing, canning or packing such marine products at sea as an incident to, or in conjunction with, such fishing operations, including the going to and returning from work and loading and unloading when performed by any such employee; or

(6) any employee employed in agriculture (A) if such employee is employed by an employer who did not, during any calendar quarter during the preceding calendar year, use more than five hundred mandays of agricultural labor, (B) if such employee is the parent, spouse, child, or other member of his employer's immediate family, (C) if such employee (i) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) commutes daily from his permanent residence to the farm on which he is so employed, and (iii) has been employed in agriculture less than thirteen weeks during the preceding calendar year, (D) if such employee (other than an employee described in clause (C) of this subsection)

(i) is sixteen years of age or under and is employed as a hand harvest laborer, is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) is employed on the same farm as his parent or person standing in the place of his parent, and (iii) is paid at the same piece rate as employees over age sixteen are paid on the same farm, or (E) if such employee is principally engaged in the range production of livestock; or

(7) any employee to the extent that such empolyee is exempted by regulations, order, or certificate of the Secretary issued under section 214 of this title; or

(8) any employee employed in connection with the publication of any weekly, semiweekly, or daily newspaper with a circulation of less than four thousand the major part of which circulation is within the county where published or counties contiguous thereto; or

(9) Repealed. Pub. L. 93-259, § 23(a)(1), Apr. 8, 1974, 88 Stat. 69.

(10) any switchboard operator employed by an independently owned public telephone company which has no more than seven hundred and fifty stations; or

(11) Repealed. Pub. L. 93-259, § 10(a), Apr. 8, 1974, 88 Stat. 63.

(12) any employee employed as a seaman on a vessel other than an American vessel; or

(13), (14) Repealed. Pub. L. 93-259, §§ 9(b)(1), 23(b)(1), Apr. 8, 1974, 88 Stat. 63, 69.

(15) any employee employed on a casual basis in domestic service employment to provide babysitting

services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary).

(b) The provisions of section 207 of this title shall not apply with respect to—

(1) any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 304 of Title 49; or

(2) any employee of an employer engaged in the operation of a common carrier by rail and subject to the provisions of part I of the Interstate Commerce Act [49 U.S.C.A. § 181 et seq.]; or

(3) any employee of a carrier by air subject to the provisions of the Railway Labor Act [45 U.S.C.A § 181 et seq.]; or

(4) Repealed. Pub. L. 93-259, § 11(c), Apr. 8, 1974, 88 Stat. 64.

(5) any individual employed as an outside buyer of poultry, eggs, cream, or milk, in their raw or natural state; or

(6) any employee employed as a seaman; or

(7) Repealed. Pub. L. 93-259, § 21(b)(3), Apr. 8, 1974, 88 Stat. 68.

(8 Repealed. Pub. L. 95-151, § 14(b), Nov. 1, 1977, 91 Stat. 1252.

(9) any employee employed as an announcer, news editor, or chief engineer by a radio or television station the major studio of which is located (A) in a city or town of one hundred thousand population or less, according to the latest available decennial

census figures as compiled by the Bureau of the Census, except where such city or town is part of a standard metropolitan statistical area, as defined and designated by the Bureau of the Budget, which has a total population in excess of one hundred thousand, or (B) in a city or town of twenty-five thousand population or less, which is part of such an area but is at least 40 airline miles from the principal city in such area; or

(10) (A) any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers; or

(B) any salesman primarily engaged in selling trailers, boats, or aircraft, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling trailers, boats, or aircraft to ultimate purchasers; or

(11) any employee employed as a driver or driver's helper making local deliveries, who is compensated for such employment on the basis of trip rates, or other delivery payment plan, if the Secretary shall find that such plan has the general purpose and effect of reducing hours worked by such employees to, or below, the maximum workweek applicable to them under section 207(a) of this title; or

(12) any employee employed in agriculture or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, or operated on a sharecrop basis, and whcih are used exclusively for supply and storing of water for agricultural purposes; or

(13) any employee with respect to his employment in agriculture by a farmer, notwithstanding other

employment of such employee in connection with livestock auction operations in which such farmer is engaged as an adjunct to the raising of livestock, either on his own account or in conjunction with other farmers, if such employee (A) is primarily employed during his workweek in agriculture by such farmer, and (B) is paid for his employment in connection with such livestock auction operations at a wage rate not less than that prescribed by section 206(a)(1) of this title; or

(14) any employee employed within the area of production (as defined by the Secretary) by an establishment commonly recognized as a country elevator, including such an estabishment which sells products and services used in the operation of a farm, if no more than five employees are employed in the establishment in such operations; or

(15) any employee engaged in the processing of maple sap into sugar (other than refined sugar) or syrup; or

(16) any employee engaged (A) in the transportation and preparation for transportation of fruits or vegetables, whether or not performed by the farmer, from the farm to a place of first processing or first marketing within the same State, or (B) in transportation, whether or not performed by the farmer, between the farm and any point within the same State of persons employed or to be employed in the harvesting of fruits or vegetables; or

(17) any driver employed by an employer engaged in the business of operating taxicabs; or

(18) Repealed. Pub. L. 93-259, § 15(c), Apr. 8, 1974, 88 Stat. 65.

(19) Repealed. Pub. L. 93-259, § 16(b), Apr. 8, 1974, 88 Stat. 65.

(20) any employee of a public agency who in any workweek is employed in fire protection activities or any employee of a public agency who in any workweek is employed in law enforcement activities (including security personnel in correctional institutions), if the public agency employs during the workweek less than 5 employees in fire protection or law enforcement activities, as the case may be; or

(21) any employee who is employed in domestic service in a household and who resides in such household; or

(22) Repealed. Pub. L. 95-151, § 5, Nov. 1, 1977, 91 Stat. 1249.

(23) Repealed. Pub. L. 93-259, § 10(b)(3), Apr. 8, 1974, 88 Stat. 64.

(24) any employee who is employed with his spouse by a nonprofit educational institution to serve as the parents of children—

(A) who are orphans or one of whose natural parents is deceased, or

(B) who are enrolled in such institution and reside in residential facilities of the institution,

while such children are in residence at such institution, if such employee and his spouse reside in such facilities, receive, without cost, board and lodging from such institution, and are together compensated, on a cash basis, at an annual rate of not less than $10,000; or

(25) Repealed. Pub. L. 95-151, § 6(a), Nov. 1, 1977, 91 Stat. 1249.

(26) Repealed. Pub. L. 95-151, § 7(a), Nov. 1, 1977, 91 Stat. 1250.

(27) any employee employed by an establishment which is a motion picture theater; or

(28) any employee employed in planting or tending trees, cruising, surveying, or felling timber, or in preparing or transporting logs or other forestry products to the mill, processing plant, railroad, or other transportation terminal, if the number of employees employed by his employer in such forestry or lumbering operation does not exceed eight; or

(29) any employee of an amusement or recreational establishment located in a national park or national forest or on land in the National Wildlife Refuge System if such employee (A) is an employee of a private entity engaged in providing services or facilities in a national park or national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture, and (B) receives compensation for employment in excess of fifty-six hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed.

(c) (1) Except as provided in paragraph (2) or (4), the provisions of section 212 of this title relating to child labor shall not apply to any employee employed in agriculture outside of school hours for the school district where such employee is living while he is so employed, if such employee—

(A) is less than twelve years of age and (i) is employed by his parent, or by a person standing in the place of his parent, on a farm owned or operated by such parent or person, or (ii) is employed, with the consent of his parent or person standing in the place of his parent, on a farm, none of the employees of which are (because of subsection (a) (6) (A) of this section) required to be paid at the wage rate prescribed by section 206 (a) (5) of this title,

(B) is twelve years or thirteen years of age and (i) such employment is with the consent of his parent or person standing in the place of his parent, or

(ii) his parent or such person is employed on the same farm as such employee, or

(C) is fourteen years of age or older.

(2) The provisions of section 212 of this title relating to child labor shall apply to an employee below the age of sixteen employed in agriculture in an occupation that the Secretary of Labor finds and declares to be particularly hazardous for the employment of children below the age of sixteen, except where such employee is employed by his parent or by a person standing in the place of his parent on a farm owned or operated by such parent or person.

(3) The provisions of section 212 of this title relating to child labor shall not apply to any child employed as an actor or performer in motion pictures or theatrical productions, or in radio or television productions.

(4) (A) An employer or group of employers may apply to the Secretary for a waiver of the application of section 212 of this title to the employment for not more than eight weeks in any calendar year of individuals who are less than twelve years of age, but not less than ten years of age, as hand harvest laborers in an agricultural operation which has been, and is customarily and generally recognized as being, paid on a piece rate basis in the region in which such individuals would be employed. The Secretary may not grant such a waiver unless he finds, based on objective data submitted by the applicant, that—

(i) the crop to be harvested is one with a particularly short harvesting season and the application of section 212 of this title would cause severe economic disruption in the industry of the employer or group of employers applying for the waiver;

(ii) the employment of the individuals to whom the waiver would apply would not be deleterious to their health or well-being;

(iii) the level and type of pesticides and other chemicals used would not have an adverse effect on the health or well-being of the individuals to whom the waiver would apply;

(iv) individuals age twelve and above are not available for such employment; and

(v) the industry of such employer or group of employers has traditionally and substantially employed individuals under twelve years of age without displacing substantial job opportunities for individuals over sixteen years of age.

(B) Any waiver granted by the Secretary under subparagraph (A) shall require that—

(i) the individuals employed under such waiver be employed outside of school hours for the school district where they are living while so employed;

(ii) such individuals while so employed commute daily from their permanent residence to the farm on which they are so employed; and

(iii) such individuals be employed under such waiver (I) for not more than eight weeks between June 1 and October 15 of any calendar year, and (II) in accordance with such other terms and conditions as the Secretary shall prescribe for such individuals' protection.

(d) The provisions of sections 206, 207, and 212 of this title shall not apply with respect to any employee engaged in the delivery of newspapers to the consumer or to any homeworker engaged in the making of wreaths composed principally of natural holly, pine, cedar, or other evergreens (including the harvesting of the evergreens or other forest products used in making such wreaths).

(e) The provisions of section 207 of this title shall not apply with respect to employees for whom the Secretary

of Labor is authorized to establish minimum wage rates as provided in section 206(a)(3) of this title, except with respect to employees for whom such rates are in effect; and with respect to such employees the Secretary may make rules and regulations providing reasonable limitations and allowing reasonable variations, tolerances, and exemptions to and from any or all of the provisions of section 207 of this title if he shall find, after a public hearing on the matter, and taking into account the factor set forth in section 206(a)(3) of this title, that economic conditions warrant such action.

(f) The provisions of sections 206, 207, 211 and 212 of this title shall not apply with respect to any employee whose services during the workweek are performed in a workplace within a foreign country or within territory under the jurisdiction of the United States other than the following: a State of the United States; the District of Columbia; Puerto Rico; the Virgin Islands; outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act (ch. 345, 67 Stat. 462) [43 U.S.C.A. § 1331 et seq.]; American Samoa; Guam; Wake Island; Eniwetok Atoll; Kwajalein Atoll; and Johnston Island.

(g) The exemption from section 206 of this title provided by paragraph (6) of subsection (a) of this section shall not apply with respect to any employee employed by an establishment (1) which controls, is controlled by, or is under common control with, another establishment the activities of which are not related for a common business purpose to, but materially support the activities of the establishment employing such employee; and (2) whose annual gross volume of sales made or business done, when combined with the annual gross volume of sales made or business done by each establishment which controls, is controlled by, or is under common control with, the establishment employing such employee, exceeds $10,000,000 (exclusive of excise taxes at the retail level which are separately stated).

(h) The provisions of section 207 of this title shall not apply for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year to any employee who—

(1) is employed by such employer—

(A) exclusively to provide services necessary and incidental to the ginning of cotton in an establishment primarily engaged in the ginning of cotton;

(B) exclusively to provide services necessary and incidental to the receiving, handling, and storing of raw cotton and the compressing of raw cotton when performed at a cotton warehouse or compress-warehouse facility, other than one operated in conjunction with a cotton mill, primarily engaged in storing and compressing;

(C) exclusively to provide services necessary and incidental to the receiving, handling, storing, and processing of cottonseed in an establishment primarily engaged in the receiving, handling, storing, and processing of cottonseed; or

(D) exclusively to provide services necessary and incidental to the processing of sugar cane or sugar beets in an establishment primarily engaged in the processing of sugar cane or sugar beets; and

(2) receives for—

(A) such employment by such employer which is in excess of ten hours in any workday, and

(B) such employment by such employer which is in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

Any employer who receives an exemption under this subsection shall not be eligible for any other exemption under this section or section 207 of this title.

(i) The provisions of section 207 of this title shall not apply for a period or periods of not more than fourteen workweeks in the aggregate in any period of fifty-two consecutive weeks to any employee who—

(1) is engaged in the ginning of cotton for market in any place of employment located in a county where cotton is grown in commercial quantities; and

(2) receives for any such employment during such workweeks—

(A) in excess of ten hours in any workday, and

(B) in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed. No week included in any fifty-two week period for purposes of the preceding sentence may be included for such purposes in any other fifty-two week period.

(j) The provisions of section 207 of this title shall not apply for a period or periods of not more than fourteen workweeks in the aggregate in any period of fifty-two consecutive weeks to any employee who—

(1) is engaged in the processing of sugar beets, sugar beet molasses, or sugar cane into sugar (other than refined sugar) or syrup; and

(2) receives for any such employment during such workweeks—

(A) in excess of ten hours in any workday, and

(B) in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

No week included in any fifty-two week period for purposes of the preceding sentence may be included for such purposes in any other fifty-two week period.

(As amended Sept. 23, 1966, Pub. L. 89-601, Title II, §§ 201 to 204(a), (b), 205 to 212(a), 213 to 215(b), (c), 80 Stat. 833, 834, 836 to 838; Oct. 15, 1966, Pub. L. 89-670, § 8(e), 80 Stat. 943; June 23, 1972, Pub. L. 92-318, Title IX, § 906(b)(1), 86 Stat. 375; Apr. 8, 1974, Pub. L. 93-259 §§ 6(c)(2), 7(b)(3), (4), 8, 9(b), 10, 11, 12(a), 13(a) to (c), 14 to 18, 20(a) to (c), 21(b), 22, 23, 25(b), 88 Stat. 61 to 69, 72; Nov. 1, 1977, Pub. L. 95 to 151, §§ 4 to 8, 9(d), 11, 14(a), (b), 91 Stat. 1249, 1250 to 1252; Sept. 27, 1979, (Pub. L. 96-70, Title I, § 1225(a), 93 Stat. 468; Nov. 17, 1989, Pub. L. 101-157, § 3(c), 103 Stat. 939.)

APPENDIX E

§ 541.118 Salary basis.

(a) An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work.

(1) An employee will not be considered to be "on a salary basis" if deductions from his predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. Accordingly, if the employee is ready, willing, and able to work, deductions may not be made for time when work is not available.

(2) Deductions may be made, however, when the employee absents himself from work for a day or more for personal reasons, other than sickness or accident. Thus, if an employee is absent for a day or longer to handle personal affairs, his salaried status will not be affected if deductions are made from his salary for such absences.

(3) Deductions may also be made for absences of a day or more occasioned by sickness or disability (including industrial accidents) if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by both sickness and disability. Thus, if the employer's particular plan, policy or practice provides compensation for such absences, deductions for absences of a day or longer because

of sickness or disability may be made before an employee has qualified under such plan, policy or practice, and after he has exhausted his leave allowance thereunder. It is not required that the employee be paid any portion of his salary for such days or days for which he receives compensation for leave under such plan, policy or practice. Similarly, if the employer operates under a State sickness and disability insurance law, or a private sickness and disability insurance plan, deductions may be made for absences of a working day or longer if benefits are provided in accordance with the particular law or plan. In the case of an industrial accident, the "salary basis" requirement will be met if the employee is compensated for loss of salary in accordance with the applicable compensation law or the plan adopted by the employer, provided the employer also has some plan, policy or practice of providing compensation for sickness and disability other than that relating to industrial accidents.

(4) Deductions may not be made for absences of an employee caused by jury duty, attendance as a witness, or temporary military leave. The employer may, however, offset any amounts received by an employee as jury or witness fees or military pay for a particular week against the salary due for that particular week without loss of the exemption.

(5) Penalties imposed in good faith for infractions of safety rules of major significance will not affect the employee's salaried status. Safety rules of major significance include only those relating to the prevention of serious danger to the plant, or other employees, such as rules prohibiting smoking in explosive plants, oil refineries, and coal mines.

(6) The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on

a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

(b) *Minimum guarantee plus extras.* It should be noted that the salary may consist of a predetermined amount constituting all or part of the employee's compensation. In other words, additional compensation besides the salary is not inconsistent with the salary basis of payment. The requirement will be met, for example, by a branch manager who receives a salary of $155 or more a week and in addition, a commission of 1 percent of the branch sales. The requirement will also be met by a branch manager who receives a percentage of the sales or profits of the branch, if the employment arrangement also includes a guarantee of at least the minimum weekly salary (or the equivalent for a monthly or other period) required by the regulations. Another type of situation in which the requirement will be met is that of an employee paid on a daily or shift basis, if the employment arrangement includes a provision that the employee will receive not less than the amount specified in the regulations in any week in which the employee performs any work. Such arrangements are subject to the exceptions in paragraph (a) of this section. The test of payment on a salary basis will not be met, however, if the salary is divided into two parts for the purpose of circumventing the requirement of payment "on a salary basis". For example, a salary of $200 in each week in which any work is performed, and an additional $50 which is made subject to deductions which, are not permitted under paragraph (a) of this section.

(c) *Initial and terminal weeks.* Failure to pay the full salary in the initial or terminal week of employment is

not considered inconsistent with the salary basis of payment. In such weeks the payment of a proportionate part of the employee's salary for the time actually worked will meet the requirement. However, this should not be construed to mean that an employee is on a salary basis within the meaning of the regulations if he is employed occasionally for a few days and is paid a proportionate part of the weekly salary when so employed. Moreover, even payment of the full weekly salary under such circumstances would not meet the requirement, since casual or occasional employment for a few days at a time is inconsistent with employment on a salary basis within the meaning of the regulations.

[38 FR 11390, May 7, 1973, as amended at 40 FR 7092, Feb. 19, 1975]

EFFECTIVE DATE NOTE: Paragraph (b) in § 541.118 was revised at 46 FR 3014, Jan. 13, 1981. In accordance with the President's Memorandum of January 29, 1981 (46 FR 11227, Feb. 6, 1981), the effective date was postponed indefinitely at 46 FR 11972, Feb. 12, 1981.

The text of paragraph (b) set forth above remains in effect pending further action by the issuing agency. The text of the postponed regulation appears below.

§ 541.118 Salary basis.

* * * * *

(b) *Minimum guarantee plus extras.* It should be noted that the salary may consist of a predetermined amount constituting all or part of the employee's compensation. In other words, additional compensation besides the salary is not inconsistent with the salary basis of payment. The requirement will be met, for example, by a branch manager who receives a salary of $250 or more a week and in addition, a commission of 1 percent of the branch sales. The requirement will also be met by a branch manager who receives a percentage of the sales or profits of the branch, if the employment arrange-

ment also includes a guarantee of at least the minimum weekly salary (or the equivalent for a monthly or other period) required by the regulations. Another type of situation in which the requirement will be met is that of an employee paid on a daily or shift basis, if the employment arrangement includes a provision that the employee will receive not less than the amount specified in the regulations in any week in which the employee performs any work. Such arrangements are subject to the exceptions in paragraph (a) of this section. The test of payment on a salary basis will not be met, however, if the salary is divided into two parts for the purpose of circumventing the requirement of payment "on a salary basis". For example, a salary of $300 in each week in which any work is performed, and an additional $55 which is made subject to deductions which are not permitted under paragraph (a) of this section.

* * * *

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil Action No. C-1-89-15

LYNN MARTIN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Plaintiff,

vs.

PIERCE PROCESSING, INC., *et al.*,
Defendants.

[Filed Mar. 25, 1992]

Findings of Fact, Conclusions of Law, Decision and Order

INTRODUCTION

This matter is before the Court upon consent of the parties for final disposition. Doc. 28. Trial to the Court occurred on Monday, February 2, 1992.

This is an action brought by plaintiff, Lynn Martin, Secretary of Labor, United States Department of Labor (Plaintiff) against Pierce Processing, Inc. (PPI) and William Pierce (Pierce) under the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U.S.C. § 201 *et seq.* (Act). Plaintiff alleges that PPI failed to pay certain of its employees overtime compensation to which they were entitled, 29 U.S.C. § 207(a)(1), and failed to maintain certain records (the home addresses of PPI's former employees) in violation of §§ 11(c) and 15(a)(5) of the Act. Defendants, PPI and Pierce, deny that they have failed to pay any employees unpaid overtime com-

pensation because the employees in question are exempt from the overtime provisions of the Act pursuant to § 13(a)(1) of the Act, 29 U.S.C. § 213(a)(1). Defendants also deny that they have failed to maintain records as required by the Act.

FINDINGS OF FACT

1. PPI is an Ohio corporation with offices in Cincinnati, Ohio and Louisville, Kentucky, and is engaged in business as an engineering consulting firm.

2. Defendant Pierce is the President of PPI and is primarily responsible for its day-to-day operations.

3. PPI consults with clients regarding the development and engineering of equipment for new products; the modification of existing products; and the packaging of products.

4. Defendants' annual dollar volume of business was in excess of $1,000,000 in 1986, 1987 and 1988, respectively.

5. Defendant, Pierce Processing, Inc., employs engineers, design managers and designers.

6. Between May, 1986 and May, 1988, PPI employed the following employees[1] as engineers, design managers or designers for various periods of time at an annual salary within the range set forth opposite the employee's name.

Employee		Salary Range
a.	Paul Bruggeman	$52,000
b.	Robert Cooks, Jr.	25,000-27,500
c.	Gregory DelVecchio	31,200-43,400
d.	Harry Driskill, Jr.	43,680-47,640

[1] These are the only employees Plaintiff claims were unlawfully not paid overtime pay in conformance with the Act. See Joint Stipulation 2 and 3. Doc. 21.

e.	Francis Fulcher	55,120
f.	Leslie Glickman	48,360-54,080
g.	Jack Hogue	43,680-47,650
h.	Robert Holt	46,280
i.	Howard Kennedy	55,120
j.	Mary Beth Manis	30,160
k.	Herbert McBride	42,640
l.	Theodore McCullough	47,840-50,750
m.	Christopher Olbur	47,840-50,960
n.	Giam Parihar	33,280-42,120
o.	Robert Poccottee	41,600-47,840
p.	Joseph Pravetz	49,400-51,480
q.	Jay Scales	22,048-23,090
r.	John Shryock, Jr.	45,160-48,465
s.	David Toth	45,760
t.	Kenneth Witsken	50,440-56,000

7. From May, 1986 to January, 1989, PPI's policy was to pay its engineers and designers on a salary basis, but to reduce their compensation on an hourly basis when employees voluntarily elected to take time off for personal reasons.

8. From May, 1986 to January, 1989, defendants' policy was to pay its engineers and designers, in addition to their salaries, a straight hourly rate for hours worked in excess of forty (40) in a work week. The hourly rate was established by dividing the employee's annual salary by 2,080 hours.

9. From May, 1986 to January, 1989, PPI's engineers' and designers' salaries were not subject to reduction because of variations in the quality or quantity of work they performed. When there was no work available, those employees were paid their fixed salaries and were instructed, for management purposes, to record the time during which no work was available as "office hours" and were paid for same.

10. Said employees were also paid when absent for holidays, vacations, and were eligible to be paid for ab-

sence due to jury duty or attendance in court as a witness. Additionally, they were eligible for sickness and disability benefits under a sickness and disability policy established by PPI.

11. During the investigation by the Wage and Hour Division, Pierce, on behalf of PPI, offered to reimburse the employees with those amounts that had been deducted from their pay when they took off for personal reasons.

12. Based upon his experience while working for other employers in the engineering business, and upon his general understanding that engineers, as professionals, are not paid overtime compensation, Pierce, in good faith believed that the pay practice that he established complied with the requirements of the Act.

13. PPI's pay practices were intended to provide additional compensation to the employees who, because of client demands or, at times, deadlines for completing a project, were required to work more than forty (40) hours during a work week. Further, the pay practices were established to provide the employees flexibility to establish their own hours in order to pursue family or recreational interests if, and when, they elected to do so.

14. As a result of being informed by the Wage and Hour Division that its pay practices violated the Act, effective January 1, 1989, PPI modified its pay practices in conformance with the requirements of the Act.

15. The parties agree that the employees in question meet all of the criteria for exemption from the overtime provisions of the Act, *see* 29 U.S.C. § 213(a)(1), 29 C.F.R. § 541.3, except for the requirement set forth in 29 C.F.R. § 541.3(e) that they be paid on a "salary basis". Defendants contend their employees were paid on a "salary basis"; plaintiff disagrees. *See* Joint Stipulation 6. Doc. 21.

16. PPI maintained adequate and accurate records of its employees and of the wages, hours, and other conditions and practices of employment of defendants, including the addresses of its present and former employees.

17. Pierce cooperated with plaintiff's compliance officer and produced all records requested with one exception. Pierce declined to produce the home addresses of PPI's former employees for fear that if those individuals were contacted, it would quickly become known in the industry that PPI was being investigated by plaintiff, which could have a negative impact on his business.

18. Plaintiff never issued an administrative subpoena requiring PPI to produce the addresses of former employees.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this matter pursuant to § 16 and § 17 of the Fair Labor Standards Act of 1938, as aended, 29 U.S.C. § 201 *et seq.*

2. Defendants constituted an "enterprise engaged in commerce" subject to the provisions of the Act. 29 U.S.C. § 203(r)(1), §§ 203(a)(1)(19)(i) and (ii).

3. Defendants are employers within the meaning of the Act. 29 U.S.C. § 203(d).

4. An employee is considered paid on a "salary basis" if, under his or her employment agreement, he or she regularly receives each pay period a predetermined amount constituting all or part of his or her compensation which is not subject to reduction because of variations in the quality or quantity of the work he or she performs. Subject to certain exceptions,[2] the employee must receive his or her full salary for any pay period in which he or she performs any work without regard to the number of days or hours worked. 29 C.F.R. § 541.118(a).

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[2] *See* ¶ 6, Conclusions of Law.

5. An employee will not be considered to be on a "salary basis" if deductions from his or her predetermined compensation are made from absences occasioned by the employer or by the operating requirements of the business. If the employee is ready, willing and able to work, deductions may not be made for time when work is unavailable. 29 C.F.R. § 541.118(a)(1).

6. Deductions are permitted when the employee absents himself from work for a day or more for personal reasons, other than sickness or accident. 29 C.F.R. § 541.118 (a)(2).

7. Where deductions are made when there is no work available, it indicates there was no intention to pay the employee on a "salary basis." Conversely, when deductions are not made when there is no work available, it indicates there was an intention to pay the employee on a salary basis. *See* 29 C.F.R. § 541.118(a)(6).

8. Where a deduction not permitted is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future. 29 C.F.R. § 541.118 (a)(6).

9. Defendants' failure to produce the home addresses of former employees did not constitute a violation of the record keeping provisions of the Act, including 29 U.S.C. §§ 211(a) and (c), or 29 C.F.R. § 516.7(b), because plaintiff failed to issue an administrative subpoena or in any way give defendants the opportunity to question the reasonableness of plaintiff's demand or to obtain protection therefrom, *see Donovan v. Long Steer, Inc.*, 464 U.S. 408, 415 (1984).

DECISION

The Act requires employers to pay their employees one and one-half their normal hourly rate for hours worked over 40 in a work week. 29 U.S.C. § 207(a)(1). PPI

did not comply with this requirement. Employers are exempt from this time and a half overtime requirement with respect to any employee employed in a *bona fide* executive, administrative, or professional capacity. 29 U.S.C. § 213(a)(1). The parties agree that the employees in question, as professionals, qualify in all respects for the exemption from the overtime provision of the Act, except for the requirement that they be paid on a "salary basis." *See* 29 C.F.R. § 541.3(a). Plaintiff contends the "salary basis" requirement is not met by defendants, because defendants reduced compensation on an hourly basis when employees voluntarily took time off for less than a day for personal reasons. Plaintiff contends this practice violated 29 C.F.R. § 541.118(a)(2) which only permits deductions on a daily basis.[3] It was defendants' practice to take deductions from an employee's salary when the employee was absent for personal reasons for less than a day. Plaintiff contends defendants' practice of deducting wages on an hourly basis violates the Act and denies defendants an exemption from the overtime payment requirements of 29 U.S.C. § 207(a)(1). The Court disagrees.

Defendants claim that because the word, "day," is not defined by the statute it is debatable whether or not defendants' salary deduction policies are in violation of 29 C.F.R. § 541.118(a)(2). For purposes of this decision, the Court finds it unnecessary to decide this debate and assumes, *arguendo*, that defendant's policy of deducting wages based upon voluntary hourly absences violates 29 C.F.R. § 541.118(a)(2). 29 C.F.R. § 541.118(a)(6) provides in pertinent part:

> Where a deduction not permitted by these interpretations is inadvertent or is made for reasons other than lack of work, the exemption will not be con-

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[3] 29 C.F.R. § 541.118(a)(2) reads in pertinent part as follows:

Deductions may be made, however, when the employee absents himself from work for a *day or more* for personal reasons, other than sickness or accident. (emphasis added)

sidered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

Here, it is clear that defendants' deductions were never made because work was lacking, but only when employees were voluntarily absent for personal reasons unrelated to whether work was available. Defendants have offered to reimburse all employes for deductions made. Further, defendant has not only promised to comply with the Act in the future, but is currently in compliance. All other aspects of this case point to a situation where the employer intended to pay his employees on a "salary basis," intended to operate within the letter and spirit of the Act, and sought to treat and pay his employees in a manner that was professional, considerate and equitable.

The Court finds that defendants did not violate the record keeping provisions of the Act. *See* Conclusions of Law 9. The Court further finds that, subject to the conditions that (1) defendants reimburse their employees for the deductions made, and (2) defendants promise to comply with the Act in the future, the employees in question are, and were, exempt from the overtime payment provision of the Act.

ORDER

Defendants are hereby ORDERED to:

1. Reimburse their employees in conformance with this decision for salary deductions made; and

2. Promise to comply with the Act in the future.

Upon completions of one and two above, and written proof of same, the Court will enter a finding on behalf of Defendants.

IT IS SO ORDERED.

/s/ Jack Sherman
JACK SHERMAN, JR.
United States Magistrate Judge

Date: 3/25/92

APPENDIX G

STATE OF CALIFORNIA
GOVERNOR'S OFFICE
Sacramento, Ca 95214

[SEAL]

PETE WILSON
Governor

Telephone
(916) 445-8341

WILSON URGES CONGRESS, LABOR DEPARTMENT TO REMOVE $3 BILLION MANDATE ON STATE AND LOCAL GOVERNMENTS

FOR IMMEDIATE RELEASE

Contact: Bill Livingstone
Franz Wisner
James Lee
(916) 445-4571

March 5, 1991

SACRAMENTO—Governor Pete Wilson today urged Congress to enact legislation to correct a technicality in a recent court ruling that could force state, county and city governments in California to pay as much as $3 billion for unpaid overtime work.

"The Court's ruling would absolutely cripple the budgets of hundreds of California cities and counties who are struggling to provide essential services during these times of limited dollars," Wilson said.

"It would also add another $1 billion to the state's deficit," Wilson said. "And force us to consider severe cuts in such crucial areas as healthcare, prisons, and education."

Specifically, Wilson asked Congress to fix a recent decision by the Ninth Circuit Court of Appeals where the court ruled that public agencies must pay overtime wages to "salaried" employees who can be docked for absences of less than one day, even if their pay has never been reduced.

Before the ruling, state and local governments paid overtime wages only to non-salaried or "hourly" workers. They were required to do so as a result of the 1974 Fair Labor Standards Act (FLSA) and subsequent Supreme Court ruling in 1985.

The case, *Kern County vs. Abshire 90-839*, involved 28 fire battalion chiefs in Kern County whose salaries ranged $40,536 to $49,476 a year. They were also given fringe benefits and extra pay for overtime (though not the traditional time-and-a-half given to employees who were paid on an hourly basis).

Though no fire chief was ever docked pay for missed work, the Court ruled that since Kern County recorded missed hours, the firemen were eligible for the premium overtime pay.

Since then, the state Office of Personnel has found a way to circumvent the ruling by removing the possibility of docking salaried workers and offering compensation time to employees in lieu of overtime pay. They have also sent notices to local governments suggesting that they follow similar procedures.

But despite the state's maneuvering, the ruling would still allow salaried employees in the public sector to file claims retroactively for up to two years of overtime.

Wilson said that there are roughly 40,000 salaried workers on the state payroll who could be eligible for as much as $1 billion in overtime pay if Congress fails to correct the technicality.

Meanwhile, California's cities and counties could be saddled with up to $2 billion in overtime costs to 125,000 employees, according to officials at the California League of Cities and the County Supervisors Association of California.

Los Angeles County alone claims the ruling could force them to pay $170 million in retroactive overtime to its

2,500 managers and 180 executive-level fire and police officials.

LETTER TO LABOR SECRETARY LYNN MARTIN

Wilson also sent a letter to newly-confirmed Labor Secretary Lynn Martin, asking her to change the way the Labor Department implements the FLSA by exempting state and local governments from the overtime provisions.

The overtime requirements "could result in millions of dollars in unanticipated (and uncontracted) overtime costs for public jurisdictions in California and other states," Wilson wrote.

The Department has promised to examine the provisions since 1987, but has failed to do so.

THE GARCIA DECISION

As a member of the U.S. Senate, Wilson successfully championed legislation to overturn a similar Supreme Court ruling in 1985, *Garcia v. San Antonio Metropolitan Transit Authority.*

The *Garcia* decision required state and local governments to pay their employees time and a half for overtime, and prohibited the virtually universal practice of giving employees compensatory time-off in lieu of overtime.

Facing stiff political opposition from the national leadership of organized labor, Wilson was able to fashion a compromise bill that allowed the continuation of "comp-time" rather than premium overtime pay.

"The *Garcia* decision is a blatant denigration of the sovereign rights of states and municipalities to manage their everyday governmental responsibilities," Wilson said at the time.